Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 308.

JOHN A. BENSON,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York,
Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from an order of the United States Circuit Court in and for the Southern District of New York, entered May 31, 1904, dismissing a writ of habeas corpus obtained by this appellant, and remanding appellant to the custody of the United States Marshal in said District to await the action of the United States District

Judge, in a proceeding to remove the appellant from the Southern District of New York to the District of Columbia.

On December 31, 1903, an indictment, found by the grand jury of the District of Columbia, charging appellant with violations of Section 5451 R. S., was filed with the Supreme Court of the District of Columbia (Rec., pp. 12-30). On December 31, 1903, appellant was arrested in the Southern District of New York upon a warrant issued by United States Commissioner Shields (Rec., p. 31). This warrant was issued upon complaint of William J. Burns, a Special Agent of the Interior Department (Rec., pp. 7-11). This complaint is on information and belief, and consists entirely of a repetition of the first count of the indictment. The basis of complainant's belief is stated to be a copy of the indictment, said copy being annexed to the complaint (Rec., p. 11). Appellant, upon being brought before the Commissioner, demanded an examination (Rec., p. 32). Hearings before the Commissioner continued on several days thereafter, until May 4. 1904, in the course of which witnesses were produced and examined by the Government and a certified copy of the indictment was admitted in evidence (Rec., pp. 34-204). No testimony was introduced by this appellant. At the close of the hearings the Commissioner made an order (p. 33) reciting that he found from the testimony probable cause to believe the accused guilty of the charge and committing him to the custody of the Marshal until a warrant for his removal to the District of Columbia for trial should be issued by the District Judge. Application was never made to the District Judge for a removal warrant. Immediately after his commitment by the Commissioner, appellant applied to the Circuit Court for the Southern District of New York for a writ of habeas corpus, and a writ of certiorari in aid thereof. The writs were granted by Judge Lacombe sitting in court. In obedience to the writ of certiorari the record of the proceedings, including

the testimony, before the Commissioner was returned. After hearing upon the returns to the writs, the Circuit Court dismissed the writ of habeas corpus and remanded the appellant (Rec., p. 207). The opinion of Judge Lacombe is in the record (p. 204). (*In re* Benson, 130 Fed. Rep., 486.)

The Indictment.

The indictment consists of eight counts.

Count First (Rec., p. 12), by way of inducement, alleges that, from January 1, 1901, to April 1, 1903, appellant was engaged with Frederick A. Hyde at San Francisco in the business of unlawfully obtaining from the United States public lands outside the forest reservations, in exchange for school lands within the forest reservations in California and Oregon, obtained from those States in a manner alleged to be contrary to the laws of said states and by alleged false and fraudulent practices. The details of the alleged fraudulent practices are set forth at considerable length and in substantially the same manner as in a subsequent indictment for conspiracy against this appellant, which was held to charge no crime against the United States, but to show at most frauds upon the States of California and Oregon. (*In re* Benson, 131 Fed. Rep., 968.) After this extended inducement, it is alleged in the first count that, on January 9, 1903, an investigation of these alleged unlawful appropriations of public lands was ordered by the Secretary of the Interior, with a view to a cancellation of the selections and patents of public lands made and obtained by Hyde and Benson, and of punishing the persons alleged to have been guilty of violations of the criminal laws of the United States in connection therewith; that such investigation was immediately begun by Special Agents Pugh and Steece, "under instructions from the said

"Secretary of the Interior that a report of their doings "and of all the facts ascertained by them in the premises "be transmitted to the said Secretary of the Interior, which "report, when so transmitted, would be for the exclusive "consideration and use of the proper officers of the said "Department of the Interior, and of the said General Land "Office, including the said Secretary of the Interior, the "Commissioner of the said General Land Office and the "Chief of the Special Service Division in the said General "Land Office hereinafter mentioned, and would be the "official and secret report of the said Special Agents, the "contents whereof should not be revealed by such Special "Agents or either of them to any unofficial person, before "or after its being transmitted to the said Secretary of the "Interior as aforesaid, and would not be intended for the "consideration or use of any person not a proper officer "of the said Department of the Interior or of the said "General Land Office as aforesaid, and particularly would "not be intended for the inspection or use of the said John "A. Benson or Frederick A. Hyde * * * , it being "true * * * that such report would be (as when "thereafter made and transmitted to the said Secretary of "the Interior it was) of such a character * * * that if "the contents of the same were revealed to the said John "A. Benson or the said Frederick A. Hyde, either directly "or indirectly, the securing of evidence to support the said "charge and to establish the facts pertaining to such un- "lawful appropriation of the said public lands by the said "John A. Benson and Frederick A. Hyde would be rend- "ered more difficult and expensive for and to the said "United States, if not impossible, and the objects of the "said investigation defeated." It is then alleged that, during the period aforesaid, Woodford D. Harlan was an officer of the United States acting in an official function under and by authority of the Department of the Interior, being Chief of the Special Service Division in the General

Land Office at Washington. Harlan's duties are then set forth as follows: "That the said Woodford D. Harlan dur-"ing the said period, by reason of his being such officer and "person acting for and on behalf of the said United States "in an official function under and by the authority of the "said Department, under the laws and the regulations "theretofore and then pursuant to law prescribed and pro-"mulgated by the Secretary of the Interior of the said "United States for the government of the said Depart-"ment and the conduct of its officers and clerks, and then "in force, was charged with certain duties, amongst others "with the duty of protecting the public lands of the said "United States from unlawful entry and appropriation, "and supervising the work of special agents employed for "such purpose, and preparing instructions to such special "agents relating to their various duties, with considering, "when received, the reports of such special agents pertain-"ing to such cases of alleged violation of the laws of the "said United States relating to the public lands as should "be referred to them for investigation, with initiating and "taking charge of proceedings looking to the cancellation of "such entries and selections of the said public lands as "should appear to be unlawful and fraudulent, and with "preparing cases for reference to the Department of "Justice; * * * and by reason of his being and acting "as such officer and person, it became and was the duty of "the said Woodford D. Harlan when discharging the duties "with which he was so charged as aforesaid * * * to "preserve and keep for the exclusive consideration and "use of the said proper officers of the said Department of "the Interior and of the said General Land Office all in-"formation and official reports coming to him the said "Woodford D. Harlan by virtue of his said office and in "his said place of trust, concerning such unlawful entries "and appropriations and concerning all violations of the "said laws and investigations thereof, and to not allow any

"such information or reports, or the contents of such re-"ports, to be in any manner given or revealed to or obtained "by any persons charged with such violations or the making "of such fraudulent entries or appropriations of such pub-"lic lands." It is then alleged that appellant, on March 15, 1903, at Washington, well knowing the premises, gave $200 to said Harlan "with intent then and there on the "part of him the said John A. Benson to induce the said "Woodford D. Harlan to do an act in violation of his law-"ful duty, that is to say, to reveal to him, the said John "A. Benson, when the same should come to his hands and "knowledge in his official capacity, the contents of the re-"port of the said special agents pertaining to the investi-"gation aforesaid." The foregoing are all the material allegations of the first count of the indictment.

Count Second (Rec., p. 16) alleges that appellant on March 20, 1903, at Washington, under the same circumstances and conditions set forth in the first count, gave said Harlan $200 "with intent then and there on the part "of him the said John A. Benson to induce the said Wood-"ford D. Harlan to do an act in violation of his lawful "duty, that is to say, to reveal to him the said John A. "Benson, when the same should come to the hands and "knowledge of him the said Woodford D. Harlan in his "official capacity, the contents of the report mentioned in "the said first count of the said Arthur B. Pugh and Harry "E. Steece, Special Agents as in the said first count afore-"said."

Count Third (Rec., p. 17) is identical with count second, except that it charges a payment on March 25, 1903, of the sum of $100.

Count Fourth (Rec., p. 17), by way of inducement repeats the description of the alleged business and practices in language identical with that of count first, except that Benson and Hyde are alleged to have been engaged in said

business on January 1, 1901, "and from thence hitherto," instead of limiting the period to April 1, 1903, as in the first count. This count also contains the same allegations concerning an investigation by the Secretary of the Interior, in language identical with that of count first, except that this count repeats merely the general allegation of the first count that the report "would be for the exclusive "consideration and use of the proper officers of the said "Department of the Interior and of the said General Land "Office," and omits the more specific additional allegation contained in count first, "including the said Secretary of "the Interior, the Commissioner of the said General Land "Office and the Chief of the Special Service Division in the "said General Land Office hereinafter mentioned." This count further differs from count first in that it omits the allegations that Harlan was Chief of the Special Service Division in the General Land Office and the allegations as to his duties as such officer, and instead alleges that Harlan was "a clerk regularly employed in the said General "Land Office," and that "by reason of his being such officer "and person acting as last aforesaid, and of his being "regularly employed in the said General Land Office, and "so having access to the records of the said Special Service "Division of the said General Land Office, was in a posi-"tion to ascertain and know the contents of any report "which should be transmitted by the said Special Agents "or either of them to, and intended for the exclusive use "of, said officers of the said Department of the Interior "and of the said General Land Office, as in this count set "forth, concerning the investigation in this count men-"tioned of the said charge against the said John A. Benson "and Frederick A. Hyde and pertaining to the said un-"lawful appropriation of the said public lands * * * "and by reason of his being such officer and person acting "for and on behalf of the said United States as in this "count aforesaid, it became and was the duty of the said

"Woodford D. Harlan to preserve and keep for the ex-"clusive consideration and use of the said proper officers "of the said Department of the Interior and of the said "General Land Office all information which might come to "his knowledge, or be ascertainable by him, by reason of his "said office and employment, pertaining to such reports as "might be so transmitted to the said proper officers by the "said Special Agents or any of them in regard to the said "investigation, without revealing the contents thereof or "any portion of the same to any unofficial person, much "less to the said John A. Benson and Frederick A. Hyde." This count then alleges a payment by appellant to Harlan on March 15, 1903, at Washington, of $200, with allegations of intent identical with those in count first.

Count Fifth (Rec., p. 21) alleges a payment by appellant to Harlan at Washington, under the circumstances and conditions set forth in the fourth count, of $200, with the same allegations of intent.

Count Sixth (Rec., p. 22) is identical with count fifth, except that it alleges a payment to Harlan on March 25, 1903, of $100.

Count Seventh (Rec., p. 22) is identical with count fourth, except that it includes the name of William J. Burns as a third special agent by whom the investigation was begun under the orders of the Secretary, and alleges a payment to Harlan on December 18, 1903, of $200.

Count Eighth (Rec., p. 26) is identical with count seventh, except that it alleges parenthetically that the report of the special agents was made and transmitted to the Secretary of the Interior on November 17, 1903, and except that this count concerns an alleged bribery of William E. Valk, who is alleged to have been a clerk in the General Land Office, the allegations concerning his employment and duties being identical with the allega-

tions concerning Harlan in counts fourth and seventh. This count alleges a payment of $100 by appellant to Valk on December 16, 1903.

Specifications of Errors.

Appellant will rely upon the following errors in the order of the court below:

1. The Court erred in dismissing the writ of habeas corpus granted herein on the 4th day of May, 1904.

2. The Court erred in remanding the petitioner (appellant), John A. Benson, to the custody of the marshal to await the action of the United States District Judge.

3. The Court erred in not discharging the petitioner (appellant) from custody.

4. The Court erred in holding that the sufficiency of the indictment is to be determined by the court in which it was found, to wit: the Supreme Court of the District of Columbia, and is not a matter of inquiry in removal proceedings.

5. The Court erred in not holding the indictment insufficient.

6. The Court erred in not holding and deciding that the indictment charges no crime or offense against the United States.

7. The Court erred in not holding and deciding that the indictment is insufficient in that it fails to set forth facts showing that any violation of a lawful duty upon the part of Harlan and Valk therein named was involved.

8. The Court erred in not holding and deciding that the indictment is insufficient in that it shows at most an inducement offered to Harlan and Valk, above named, to

do an act which could be done by them only upon the happening of a condition or contingency which might never be fulfilled and which act, in any event, constituted an offense only upon the happening of a condition or contingency which might never exist or occur.

9. The Court erred in not holding and deciding that there is no evidence of probable cause warranting the commitment of the petitioner (appellant).

10. The Court erred in not holding and deciding that the evidence introduced before the Commissioner in behalf of the prosecution contradicted the indictment and destroyed the *prima facie* case of probable cause made by the indictment.

11. The Court erred in not holding and deciding that the evidence introduced in behalf of the prosecution affirmatively shows that no offense against the United States was committed by the petitioner (appellant).

12. The Court erred in holding and deciding that it was unnecessary for the Court to make any analysis of the evidence.

13. The Court erred in not holding and deciding that the offenses alleged in the indictment, if any, are shown by the evidence to have been committed in California.

14. The Court erred in not holding and deciding that as to the offenses alleged in the first six counts of the indictment, petitioner (appellant) is entitled, under the United States Constitution, Article III., Section 2, and under the sixth amendment to the Constitution to a trial in the State of California.

15. The Court erred in not holding and deciding that the petitioner (appellant) is, in any event, entitled to a trial in the State of California upon all the offenses alleged in the indictment.

16. The Court erred in holding and deciding that Section 1014 U. S. R. S. authorizes the removal of the petitioner (appellant) from the Southern District of New York to the District of Columbia.

17. The Court erred in not holding and deciding that the District of Columbia is not such a District as is within the meaning of Section 1014 U. S. R. S.

18. The Court erred in not holding and deciding that Section 1014 U. S. R. S. authorizes removal from one judicial district of the United States to another judicial district of the United States, and that the District of Columbia is not a judicial district of the United States.

19. The Court erred in holding and deciding that the act of February 21st, 1871 (16 Statutes at Large, 426; Section 93, Revised Statutes, District of Columbia) extends the application of Section 1014 U. S. R. S. to the District of Columbia to the extent of authorizing the removal of prisoners from a judicial district of the United States to said District of Columbia.

20. The Court erred in not holding and deciding that the petitioner (appellant) is unlawfully restrained of his liberty.

21. The Court erred in not holding and deciding that the petitioner (appellant) is deprived of his liberty without due process of law within the meaning of the fifth amendment to the United States Constitution.

ARGUMENT.

POINT FIRST.

This Court has jurisdiction.

Section 5 of the Judiciary Act (Act of March 3, 1891, Chapter 517) provides that an appeal may be taken from a Circuit Court direct to this Court "in any case that involves the construction or application of the constitution of the United States."

This proceeding is based upon the allegation that the appellant's detention is without due process of law and, therefore, in violation of the Fifth Amendment to the Constitution. The petition alleges (Rec., p. 2, Par. 6) "that the aforesaid arrest, commitment, detention, re-"straint and imprisonment of your petitioner are illegal, "without due process of law and contrary to and in vio-"lation of the provisions of the Constitution and Laws of "the United States."

The 21st assignment of error (Rec., p. 213) is that "The court erred in not holding and deciding that the "petitioner is deprived of his liberty without due process "of law within the meaning of the fifth amendment to the "United States Constitution."

The appellant has contended throughout this proceeding that the indictment charges no crime under the laws of the United States, and that the evidence does not disclose or tend to disclose probable cause to believe that he committed any crime; that no crime is disclosed by the record which is triable by the Supreme Court of the District of Columbia; that the Commissioner was absolutely without jurisdiction or authority to order the arrest or commitment of appellant for removal to a distant tri-

bunal for trial, and that the process under color of which he is restrained of his liberty is illegal and void. These contentions are specified in detail in the petition (Rec., p. 2, par. 6). The arrest and detention for purposes of removal under such circumstances manifestly constitute a deprivation of liberty without due process of law.

The appellant also contended below that Section 1014, R. S., upon which this entire proceeding is founded, does not authorize a removal from a federal judicial district to the District of Columbia. This was not stated in the petition, but was argued before the Court below, as the opinion shows (Rec., p. 205). If this contention is well founded, then commitment for removal to the District of Columbia is a detention without due process of law. The court's failure to sustain this contention is assigned as error (Rec., p. 212, Assignments 16 to 19).

The appellant further contended that he is entitled under the Constitution, Art. III, Sec. 2, and under the Sixth Amendment to a trial in the State of California. This is shown by the opinion of the court below (Rec., p. 205). The court's failure to sustain this contention is assigned as error (Rec., p. 212, Assignments 13 to 15).

The record, therefore, discloses that the case involves questions of the construction and application of the constitution and that those questions were presented by appellant in the court below. This court accordingly has jurisdiction of this appeal.

Beavers v. Henkel, 194 U. S., 73.
Greene v. Henkel, 183 U. S., 249.
Wright v. Henkel, 190 U. S., 40.
Carter v. McClaughry, 183 U. S., 365, 381.
Burton v. United States, 196 U. S.
Horner v. United States, No. 2, 143 U. S., 570.

POINT SECOND.

The appellant is deprived of his liberty without due process of law. The Commissioner was without jurisdiction to order his arrest or committment. The process under color of which appellant is restrained of his liberty is illegal, unauthorized and void.

The proceedings before the commissioner were based upon the sworn complaint of Special Agent Burns. The complaint is merely a repetition of the first count of the indictment, the indictment being made a part of the complaint. Therefore, it is unnecessary to consider the complaint separately. Any analysis or criticism of the first count of the indictment will include the complaint.

The only authority claimed by the Government for this proceeding, the only basis of the commissioner's jurisdiction, is Section 1014 R. S., providing that "for any "crime or offence against the United States the offender "may * * * by any commissioner of a Circuit Court "* * * be arrested and imprisoned or bailed, as the "case may be, for trial before such court of the United "States as by law has cognizance of the offence."

The only attempted charge of a crime or offence presented to the commissioner was that contained in the certified copy of the indictment. This indictment charges no crime or offence against the United States. The evidence produced before the Commissioner in behalf of the Government cured no defects in the indictment, but on the contrary contradicted the allegations of the indictment in important particulars, as will be hereafter shown.

Consequently, the Commissioner was without jurisdiction to arrest or commit the appellant, and the district judge would have been without jurisdiction to order his removal. The process of the Commissioner under color of which appellant is detained having been issued without jurisdiction, is void, and appellant is deprived of his liberty without due process of law.

In *Greene v. Henkel,* 183 U. S., at page 261, this Court said: "We do not, however, hold that when an indictment "charges no offence against the laws of the United States, "and the evidence given fails to show any, or if it appear "that the offence charged was not committed or triable in "the district to which the removal is sought, that the court "would be justified in ordering the removal, and thus sub-"jecting the defendant to the necessity of making such a "defence in the court where the indictment was found. "In that case there would be no jurisdiction to commit "nor any to order the removal of the prisoner."

Judge Lacombe, in this case below, declined to give due consideration to appellant's contentions that the indictment charged no crime. He said in his opinion: "It is now well settled that the sufficiency of the indict-"ment is to be determined by the court in which it was "found and is not matter of inquiry in removal proceed-"ings (*Greene v. Henkel,* 183 U. S., 249; Beavers v. Henkel, "194 U. S., 73)."

Judge Lacombe evidently overlooked the language of this Court in the *Greene* case above quoted, and perhaps may have misunderstood certain language of Mr. Justice Peckham in the *Greene* case, at page 262, used in reference to the contention there made that the grand jury which found the indictment was not legally empanelled, and also by certain language in the *Beavers* case, at page 87, used by Mr. Justice Brewer in reference to the contention there made that the prisoner should have been allowed to show that the grand jury had not sufficient evi-

dence before it to justify the indictment. No question of the sufficiency of the indictment as charging a crime was before this Court in either the *Greene* or the *Beavers* case. Through this error of the court below appellant's writ of habeas corpus was dismissed without due consideration of his contentions that the indictment is vitally and fatally defective.

That Judge Lacombe erred in holding that he could not pass upon the sufficiency of the indictment, and decide whether it charges a crime against the laws of the United States, seems to have been very soon conceded by himself (*In re Benson*, 131 Fed. Rep., 968). In that case the same defendant was held by the Commissioner in New York for removal to Washington upon a different indictment. A habeas corpus writ was issued by the Circuit Court. Judge Lacombe examined the sufficiency of that indictment, and two months after the decision in this case, held that indictment insufficient because it failed to state a crime, and discharged the prisoner. Judge Lacombe, therefore, seems to have overruled the fundamental point of his decision in this case, almost immediately after it was made.

The sufficiency of the charge of a crime is jurisdictional. It has always been held that the writ of habeas corpus is a proper instrument to secure the release of a prisoner held under order or sentence of a tribunal which acted without jurisdiction, and whose process was consequently void.

In re Nielson 131 U. S., 176
In re Coy, 127 U. S., 731.
In re Snow, 120 U. S., 274.
In re Sawyer, 124 U. S., 200.
Ex parte Bain, 121 U. S., 1.
In re Ayers, 123 U. S., 443.
Ex parte Siebold, 100 U. S., 371.
Ohio v. Thomas, 173 U. S., 276.

It has been the practice in all Federal jurisdictions, in removal proceedings, to determine whether the indictment sufficiently charges a crime and to discharge the prisoner if it does not.

Stewart v. U. S., 119 Fed., 89.
In re Buell, 3 Dillon, 116.
In re Terrell, 51 Fed., 213.
In re Corning, 51 Fed., 205.
In re Dana, 68 Fed., 886.
United States v. Lee, 84 Fed., 626.
In re Greene, 52 Fed., 104.
In re Belknap, 96 Fed., 614.
In re Huntington, 68 Fed., 881.
In re Conners, 111 Fed., 734.
In re Doig, 4 Fed., 193.

In *In re Palliser*, 136 U. S., 257, this Court, in a removal proceeding similar to that at bar, examined the indictment to ascertain whether it charged a crime.

POINT THIRD.

It appears affirmatively, both in the indictment and in the testimony of the Government's witnesses, that at the time of the payments to Harlan and Valk, the special agents' report had not come within the possession, knowledge or reach of either of them, and there is no allegation or proof that it ever would. They had no duty concerning it, and it was not shown that they ever would have any such duty. The crime of bribery cannot be predicated upon a payment to an officer to induce him to perform an act, as to which he has no duty, and may never have any duty.

The argument under this heading assumes that there was a duty imposed upon Harlan and Valk to preserve the secrecy of documents of the kind described. It is not intended to concede that there was any such duty, except for the point now under argument. It appears later herein that there was no such duty.

The indictment purports to charge defendant with the crime of bribery under Section 5451, R. S. This Section reads as follows:

"5451. Every person who promises, offers, or gives "or causes or procures to be promised, offered or given, "any money or other thing of value, or makes or tenders "any contract, undertaking, obligation, gratuity or se- "curity for the payment of money, or for the delivery or "conveyance of anything of value, to any officer of the "United States, or to any person acting for or on behalf

"of the United States in any official function, under or by "authority of any department or office of the Govern- "ment thereof, or to any officer or person acting for or on "behalf of either House of Congress, or of any committee "of either House, or both Houses thereof, with intent to "influence his decision or action on any question, matter, "cause or proceedings which may at any time be pending, "or which may by law be brought before him in his official "capacity, or in his place of trust or profit, or with intent "to influence him to commit or aid in committing, or to "collude in, or allow, any fraud, or make opportunity for "the commission of any fraud on the United States, or "to induce him to do or omit to do any act in violation of "his lawful duty, shall be punished as prescribed in the "preceding section."

The indictment is framed under the final clause of this section, declaring it a crime to give anything of value to any person acting for the United States in any official function, with intent to induce him to do or omit to do any act, in violation of his lawful duty. Every count expressly alleges the payment to have been made "with intent * * * to induce the said Woodford D. Harlan (or William E. Valk) to do an act in violation of his lawful duty, that is to say, to reveal to him, the said John A. Benson, *when the same should come to his hands and knowledge in his official capacity*, the contents of the report of the said special agents."

The report is not alleged to have been within the jurisdiction of either Harlan or Valk, or in their possession or accessible to them at the time of the alleged payments to them by the appellant. There is no allegation in the indictment that the report ever came within the jurisdiction or scope of the official duties or knowledge of either of these employees of the Land Office. The allegation that such payments were made to induce each of them to reveal the contents of the expected report "when the same should come to his hands and knowledge in his official capacity," constitutes a declaration that at that time no such report had come to his hands or knowledge. If it had not

reached him, there can be no certainty that it ever would reach him. There is not an allegation that this report would ever come within the jurisdiction of these employees. There is the most studious and precise care on the part of the pleader to avoid such an allegation and to endeavor to supply the inability to make this essential and vital averment.

The first count (Rec., p. 15) alleges that Harlan was Chief of the Special Service Division of the General Land Office, that his duties were to protect the public lands from unlawful entry, to supervise the work of special agents employed for that purpose, to prepare instructions to such special agents and to consider their reports when received. The count then alleges that by reason of his being and acting as such officer, it became his duty (an allegation of a conclusion and not of a fact) to keep secret any information and official reports coming to him by virtue of his office. These statements contain no reference to this particular report. The general allegation that it was his duty to supervise special agents' work, give them instructions and consider their reports when received, has no tendency to show that this report would ever come to him, or be within his jurisdiction or within the scope of his duties. The contrary appears in the indictment itself. It is alleged (Rec., p. 14) that this investigation was ordered by the Secretary of the Interior; that the special agents were instructed by the Secretary to transmit their report to the Secretary. It is alleged that the report would be "(as when thereafter made and transmitted to the said Secretary of the Interior it was)" of such a character, etc. The investigation was not one in the routine of the Land Office, which Harlan might initiate and supervise and the report of which would be transmitted to him, but it was a special investigation under the personal direction of the Secretary. It was not to be reported to Harlan, but, as the indictment shows, to the Secretary.

The second and third counts refer generally to the first for their statements of facts, and so are subject to the same comments. The fourth count (Rec., p. 20) does not allege that Harlan was Chief of the Special Service Division, but alleges that he was a clerk in the Land Office. It is alleged that by reason of being so employed and so having access to the records of the said Special Service Division of the General Land Office, he was in a position to ascertain and know the contents of any report which should be transmitted by the special agents. This allegation amounts to nothing, except to state that if any report should ever be filed in the Special Service Division, Harlan was in a position to see it. There is no allegation that this report was or ever would be filed in the records of the Land Office.

Counts fifth, sixth and seventh are identical in this respect with count fourth, as are also the allegations of count eighth in reference to Valk.

So far as the first seven counts show, the report was not even in existence at the time of the alleged payments. Count eighth alleges parenthetically (Rec., p. 29) that the report was transmitted to the Secretary of the Interior on November 17, 1903. The payments to Harlan in the first seven counts are alleged as having been made respectively on March 15, 20, 25, 15, 20, 25, and December 18, 1903, and to Valk on December 16, 1903. Hence the indictment shows that at the time of the payments alleged in counts first to sixth, the report was not then in existence. At the times alleged in counts seventh and eighth it appears from the eighth count that it was in existence, in the possession of the Secretary, but it is not alleged to have been within the knowledge, possession or jurisdiction of these employees; and the seventh and eighth counts, it will be remembered, rest only upon the allegations that Harlan and Valk were clerks in the Land Office and had access to its records, but without any allegation that this

particular report was ever filed among such records or was ever destined for the archives of that office.

That our criticisms of the indictment are not technical, and that the omission of an allegation that this particular report ever came to the knowledge of the land office employees is not inadvertent but a substantial defect, is proved by the Government's own witnesses, and these are the same witnesses who testified before the Grand Jury, as appears by the names endorsed on the indictment (Rec., p. 30).

The instructions to Special Agent Pugh signed by the Secretary of the Interior in person were introduced in evidence (Rec., pp. 44, 45) showing that this investigation was not one in the regular routine of the Land Office such as those which Harlan initiated and supervised. Burns, one of the special agents engaged in this investigation, testified that he made verbal reports to the Secretary (Rec., p. 193); that he acted under appointment by the Secretary (Rec., p. 194); that he made a written report to the Secretary in November, 1903 (Rec., p. 195); and that his reports were to the Secretary and to nobody else (Rec., p. 195). Harlan testified that the investigation was in progress when he first learned of it, which shows that he did not initiate it (Rec., p. 97). Further it appears that he had no official relation to the investigation, as his offer to appellant was to try to get a copy of the report from Steece (Rec., pp. 84, 85). He testified that in March, 1903, he did not have the report; that he did not know whether he could ever get it; that he expected to get it from Steece through personal friendship (Rec., p. 139); that when he wrote appellant in March about the investigation the report had not been made (Rec., p. 140); that it had not been made at the time of his receipt of money from the appellant in March (Rec., p. 141). As to the December transaction, Harlan testified that he did not know in December as a matter of fact whether the report had ever been made (Rec., p. 141); that he offered to endeavor to obtain for

the appellant from the stenographer the notes of the investigation, not the report of the Special Agents from any file under his control or within his reach as an officer (Rec., pp. 102, 149); but that he did not have the stenographer's notes and could not get them unless he stole them, and was not in a position to get them at all in the usual course of his duty, and that in any event appellant said he did not want the stenographer's notes (Rec., p. 132); that the fictitious information he gave appellant in December as to the names of persons who had testified in the investigation, he did not obtain from any of the secret archives of the government (Rec., p. 136), but from Special Agent Burns, as a part of the plan to entrap appellant into paying money to him (Rec., p. 136); that in December, in the usual course of business, he had no access to any report made by any special agents, and that he did not then offer appellant any special agents' report (Rec., p. 137).

The testimony of Valk is absolutely devoid of the slightest reference to any special agents' report. It relates entirely to an arrangement said to have been made in 1897, under which Harlan and Valk helped to expedite Benson's cases, and which was dragged in to prejudice the appellant's case; this testimony was offered by the United States Attorney expressly and only for the purpose of showing antecedent relations between appellant and the witnesses.

This brief reference to the testimony of the Government's own witnesses proves conclusively that the indictment is fundamentally short of necessary averments, and that our criticism is not as to formalities or technicalities; that the omissions of essential facts to show that the report was within the jurisdiction, possession or knowledge of either Harlan or Valk cannot be cured.

Both the indictment itself and the Government's own evidence before the Commissioner show, therefore, that the report was not within the jurisdiction of either Har-

lan or Valk, and probably never would be; that it was not even within their knowledge or accessible to them, and might never be; that neither had any duty to exercise concerning it, and never would have. Bribery cannot be predicated upon a payment made to induce employees of the Land Office to reveal a report then not in existence and which was not within their official functions or their knowledge. Whether the report would ever come within Harlan's jurisdiction as Chief of the Special Service Division depended at the times of the payments, first, upon its being sometime made, and then upon the contingency or possibility of its being referred to his division by the Secretary of the Interior, a contingency the uncertainty of which is shown by the fact that the report was not even made until long after Harlan had ceased to be connected with the Special Agents' Division. Whether the report would ever be accessible to Harlan or Valk as clerks in the Land Office depended upon the contingency of its being filed with the records of that office. But bribery cannot be predicated upon the happening of a contingency.

Harlan and Valk could, of course, have no present duty with reference to a thing then non-existent; they could not be bribed to commit a violation of lawful duty in respect of a particular matter, when that particular matter did not and might never exist, and when they might never in any event have a duty to exercise respecting it. It is the essential element of the crime of bribery under consideration that the act which is to be committed or omitted must be a violation of the official's lawful duty. The criminal character of the transaction must be complete at the time of the offer or payment made to induce the official action. Money may be paid to an official to do something entirely outside of his official duties, and the transaction is innocent. The transaction originally innocent, cannot be made corrupt by the happening of

some contingency at a future time which brings the act to be done within the scope of the official's duties. This is equally true, even when the parties expected at the time of the offer that the contingency would happen, and that the act contemplated would be a violation of lawful duty. Otherwise, the crime would lack certainty and would depend not upon facts but upon contingencies and upon the intention and expectation of the parties; and a man might be held guilty of bribery for attempting to induce an act by an official which he believed to be a violation of the official's lawful duty, although the matter might never in fact come within the scope of the duty of such official. This would be to convict solely for harboring a guilty intention.

In *In re Yee Gee, 83 Fed., 145* (U. S. District Court, Northern District of Washington), the defendant was indicted under Section 5451 R. S., for bribery of an interpreter to render a favorable translation of certain Chinese documents intended to be offered in evidence before a United States Commissioner in a criminal charge then pending against the defendant. It was held that the indictment was insufficient because the interpreter held his position under an appointment by the Secretary of the Treasury, and because he had not at the time of the offer by the defendant been designated to serve as an interpreter before the United States Commissioner. Judge Hanford said: "He could not be accepted as an interpreter "at the hearing of Yee Gee's case without the approval and "authorization of the Commissioner presiding at the hear-"ing. Therefore, if, in acting as an interpreter at such "hearing, he may be regarded as performing in any sense "an official function, his official character would be derived "from his appointment or designation to act in that capa-"city by the commissioner, and not from his general ap-"pointment from the Secretary of the Treasury. It is my "opinion that the offer to bribe alleged to have been made

"by Yee Gee does not amount to a completed offence within "the provisions of Section 5451, for the reason that it was "not intended to influence Mr. Gardner in the manner of "performing his duty under his appointment from the "Secretary of the Treasury, and he had not at that time "been appointed or designated by the commissioner to "serve as an interpreter at the contemplated hearing, and "held no relation to the action by reason of any appoint-"ment to act as an interpreter in any judicial proceeding. *"An offer made to a person in contemplation of a mere "probability that he may be called to perform official func-"tions, and intended to influence his conduct in perform-"ance of such functions, if he shall be so called, does not "violate this statute."*

In the recent important case of *State v. Butler, 178 Mo., 272* (Supreme Court of Missouri), an officer of a company engaged in disposing of the garbage of St. Louis was indicted for attempted bribery of a member of the Board of Health, to procure the latter's vote for a renewal of a contract with the city enjoyed by the defendant's company. The statute under which the indictment was found defined bribery as an offer of money to an official to induce his vote on any question which might by law be brought before him in his official capacity. The Municipal Assembly had assumed by an ordinance to give the Board of Health power to let the contract in question. It was urged by the defendant that it did not appear that at the date of the alleged attempted bribery the ordinance had been approved and signed by the Mayor, and that for that reason there was no ordinance in existence at the time of the alleged offer conferring jurisdiction upon the Board of Health in the matter in question. Although the ordinance had been enacted by the Assembly and the criminal intent of the defendant was complete, this contention was sustained, the Court saying (p. 319): "The offence must be "complete at the time of the offer and cannot be made to

"depend upon the future action of the law makers, who "might possibly some time in the future enact a law which "would require the officer to act upon questions which may "come before him. This would make the offence depend "upon a condition or a contingency which might never "happen."

In *State v. Joaquin, 69 Me., 218,* the defendant had been indicted under a statute making it a crime to endeavor to incite another to commit perjury in a proceeding before any court created by law or in relation to which an oath is by law authorized. It appeared that the defendant had sought to induce another to commit perjury in a suit not then actually pending, but which was designed to be brought. The Court held that this did not involve a violation of the statute, saying: "The objection is that the "suit or proceeding was not pending. It might never be "commenced. Therefore, it was an instigation to commit "an offence upon a condition or contingency that might "never happen. This was rather an ideal than a real "offence, morally reprehensible, no doubt, but not such as "the law sees fit to notice."

In *State v. Howard, 137 Mo., 289,* the defendant was indicted under a law declaring it a crime to offer a valuable consideration to procure or intice another to commit perjury "in any cause, matter or proceeding in or concerning which such other person might by law be sworn." The defendant had offered an inducement to another to commit perjury in a prosecution of the defendant not then commenced, but for which he was under recognizance. It was held that this inducement constituted no violation of the statute.

In *Newman v. State, 97 Ga., 367,* the defendant was indicted for attempted bribery of the presiding justice of an appellate court, the bribe having been offered for the purpose of influencing his decision in a certain case. It

appeared that some of the steps necessary for an appeal to that court had been taken, but that the appeal had not been properly perfected. It was held that the charge of bribery could not be sustained since no case was lawfully pending in the Appellate Court with reference to which the offence of attempted bribery could be committed.

In *Moore v. State, 69 S. W. Repr., 521* (Texas Criminal Appeals), the appellant was indicted for bribery of a deputy sheriff to allow him to escape from custody. The statute made it criminal to bribe or offer to bribe any peace officer to permit any prisoner in his custody to escape, and the Penal Code defined a bribe as a gift or offer for the purpose of influencing an officer in the performance of any duty, public or official. It appeared at the trial that the deputy sheriff had taken appellant into custody on a criminal charge, but acted without a warrant, and that the arrest was illegal. It was held that the officer was not performing a legal duty, and that appellant, therefore, was not guilty of bribery.

See to the same effect *Ex parte Richards, 72 S. W. Repr., 838, 839* (Texas Criminal Appeals).

In *Messner v. State, 40 S. W. Repr., 438* (Texas Criminal Appeals), it was held not to constitute bribery to offer to a private citizen, to whom a sheriff had temporarily committed the custody of the prisoner, a reward for allowing an escape.

In *Barefield v. State, 14 Ala., 603,* it was held that a tender of a bribe to a justice of the peace corruptly to decide a cause not then pending, but afterwards to be instituted before him, was not within the statute against offering to an official any gratuity with the intent of influencing his act or decision on any matter which may be pending, or may by law come before him in his official capacity.

POINT FOURTH.

Neither Harlan nor Valk was forbidden by any lawful duty to reveal to Benson the contents of the report, even if they ever should come into a position to do so.

Each count of the indictment alleges that Benson paid money to Harlan or Valk to induce him to reveal to Benson the contents of the Special Agents' report, when it should come into his hands and knowledge in his official capacity, which act, it is alleged, would be a violation of his lawful duty. This is on its face not an allegation of fact, but a mere conclusion of the pleader. Nor is the pleader's inference supported by any other allegation of fact in the indictment, nor by any evidence taken before the Commissioner. On the contrary the evidence as to duty contradicts the pleading. No statute exists which made it unlawful for Harlan and Valk to reveal the contents of the report, and the bribery section of the Revised Statutes contemplates only violations of lawful duty, that is to say, duty imposed by law. But even if a broader construction must be given to the words "lawful duty," still it was not alleged in the indictment or otherwise shown that the duty of secrecy as to such reports was imposed by any department regulation, rule, order, or even by regular course of business. The contrary was proven by the Government's witnesses.

(a) *The indictment contains no allegation of fact showing that it would be a violation of duty for Harlan or Valk to reveal the contents of the report.*

In the *Beavers Case*, 194 U. S., 73, 85, this Court has held that an indictment found by a grand jury should be

accepted in any removal proceeding as at least *prima facie* evidence of probable cause. The Court has thus, in such proceedings, relaxed the common rule that evidence of facts must be direct, and holds that a magistrate may accept, as evidence of jurisdictional facts, the statements of fact contained in the indictment. But the Government in no such case is relieved of its obligation to prove facts by some kind of evidence, and the indictment cannot furnish evidence of any facts not stated in it. The sufficiency of the indictment as evidence must be limited to the facts which it states. A magistrate has no jurisdiction to hold a prisoner in a removal proceeding except upon facts presented showing probable cause to believe that the prisoner has committed the crime charged. The magistrate may accept statements of fact, whether presented by witnesses or in an indictment, but the conclusions of a witness furnish no evidence upon which a magistrate may act, and still less can the conclusions of a pleader, or of a grand jury, be legitimately used to supply a deficiency of proof of facts.

This indictment fails to state any facts showing that it would be a violation of duty for Harlan or Valk to reveal the contents of the report, if they ever came into position to reveal it. Every allegation on the subject of duty is a conclusion of the pleader.

The witnesses produced by the Government not only failed to supply the defect in the indictment as to proof of duty, but they affirmatively showed that no such duty as is claimed was imposed upon Harlan and Valk.

This point is substantial and not technical, for it could not be overlooked or amended by the trial court, as is shown herein, and is so controlling and final that it could be passed upon as well in the court of removal as in the court of trial. Assuming this, the prisoner ought not to be subjected to a removal merely that the trial court may hold that a crime is not charged, when such condition is apparent to the court of removal.

The statements in the indictment material to this point are: That an investigation was ordered by the Secretary to be made by Special Agents Pugh and Steece for the purpose of ascertaining the facts as to selections of land by Hyde and Benson, with a view to the rejection and cancellation of their selections, and to punishing any guilty persons; the special agents were instructed to make a report to the Secretary, "which report when so "transmitted would be for the exclusive consideration and "use" of the officers of the department, and "would be "the official and secret report, the contents whereof should "not be revealed by such special agents or either of them "to any unofficial person" and "would not be intended for "the consideration or use of any person not a proper officer "of the department" and "particularly would not be in-"tended for the inspection or use of" Benson, that such report would be, when made, by reason of its tending to show the guilt of Benson, such that, if the contents were revealed to Benson, the securing of evidence against him would be rendered more difficult or impossible, and the objects of the investigation defeated (Rec., p. 14). Each count alleges that on a specified date in 1903 the appellant gave money to Harlan or to Valk "with intent "* * * to induce the said Woodford D. Harlan (or William E. Valk) to do an act in violation of his law-"ful duty." In an attempt to show that the publication of the contents of the report would constitute a violation of lawful duty the following allegations were made: Count first (and count second and third by reference to count first) alleged that until April 1, 1903, Harlan was Chief of the Special Service Division in the General Land Office; that (Rec., p. 13) "by reason of his being such "officer and person" he was charged with the duties of protecting the public lands from unlawful entry, supervising the work of special agents employed for such purposes, preparing instructions to such special agents, with con-

sidering, when received, the reports of special agents, etc., and that "by reason of his being and acting as such officer "and person it became and was the duty of the said Wood- "ford D. Harlan when discharging the duties with which "he was so charged as aforesaid * * * to preserve "and keep for the exclusive consideration and use of the "said proper officers of the said Department of the In- "terior and of the said General Land Office all information "and official reports coming to him, the said Woodford D. "Harlan, by virtue of his said office and in his said place "of trust concerning such unlawful entries and appropria- "tions * * * and to not allow any such information "or reports or their contents to be in any manner given or "revealed to or obtained by any persons charged with "such violations." Counts fourth and seventh (and counts fifth and sixth by reference to count fourth) are not based upon Harlan's connection with the Land Office as Chief of the Special Service Division, but allege that Harlan was a clerk in the General Land Office; and that said Harlan (Rec., pp. 20 and 25) "by reason of his being "such officer and person acting as last aforesaid and of "his being regularly employed in the said General Land "Office and so having access to the records of the said "Special Service Division of the said General Land Office "was in a position to ascertain and know the contents of "any report which should be transmitted by said special "agents, or either of them to and intended for the exclus- "ive use of said officers of the said Department of the In- "terior and of the said General Land Office" and that "by "reason of his being such officer and person acting for and "on behalf of the said United States, as in this count "aforesaid, it became and was the duty of the said Wood- "ford D. Harlan to preserve and keep for the exclusive "consideration and use of the said proper officers of the "said Department of the Interior and of the said General "Land Office all information which might come to his "knowledge or be ascertainable by him by reason of his said

"office and employment pertaining to such reports as "might be so transmitted to the said proper officers by "the said special agents."

The allegations of the eighth count in reference to the employment of Valk as a clerk in the Land Office and his supposed duties are identical with the allegations of counts fourth and seventh in reference to Harlan.

These allegations as to the duty of secrecy on the part of Harlan and Valk are not allegations of fact, but are, on their face, mere statements of the pleader's conclusions. No facts are elsewhere alleged in the indictment from which it appears that these conclusions are correctly drawn. The first three counts allege Harlan's employment as Chief of the Special Service Division, and it is alleged that by reason of his being such an officer he was charged with the duty of initiating investigations by special agents and of considering their reports upon such investigations, when received. These allegations as to the duties with which he was charged are also stated as conclusions and not as matters of fact, but they would not in any event justify the conclusion that there was any duty of secrecy on his part with reference to this particular special agent's report of an investigation which he did not initiate. That it was his duty to initiate investigations and to consider reports thereon has no tendency to prove that it was his duty to keep the contents of such report secret. The counts, other than the first three counts, allege merely the employment of Harlan and Valk as clerks in the Land Office, and that by reason of said employment they had access to reports of special agents. These allegations certainly do not justify the conclusion that any duty of secrecy existed on their part, especially with reference to this particular special agent's report, which was not and which probably never would be on file in the Land Office. That their employment in the Land Office gave them access to the records of a particular Divi-

sion of the Land Office has no tendency to prove that it was their duty to keep the contents of such records secret.

The indictment contains, therefore, no statement of fact that a duty existed to keep the report secret. There is no statute imposing the duty. It was affirmatively shown by the chief clerk of the Land Office, and by other Government witnesses, that there was no regulation, and no rule or order purporting to impose the duty of secrecy. No fact whatever was proven, showing that any such duty of secrecy had even been established, or that the discretion of Harlan as to publication of reports had ever been curtailed.

Some claim was made that this report was in its essential nature secret and confidential. The allegations that such report "would be for the "exclusive use of" the officers of the department, etc., are perhaps intended to support this idea, but these allegations also are mere conclusions, and nothing was offered as facts to sustain them. It cannot be assumed that there would be anything in the report on Benson that would in its nature be secret. The report might exonorate him, in which case it ought to be made public. It might contain statements which should be furnished to him to answer. Special agent's reports, within common knowledge, are often given out publicly or to those interested in them. They are not read and filed merely, they are used, and use means communication of their contents to persons in and out of the department. The discretion of this use must vest in some officials, and if such discretion was not vested in Harlan, the Chief of the Special Agents Division, or if he was under duty to preserve the secrecy of the reports, then that ought to have been shown by some statute, regulation or order to that effect, or by some witnesses competent to show the fact; the failure to prove so important and vital a fact cannot be supplied by assumption that the report, when received by Harlan, if ever,

would be such a report that it would be his lawful duty to hide its contents from Benson.

An allegation that a duty exists or that a certain thing is a person's duty is a conclusion of law. It is for the court to determine upon a disclosure of the facts whether or not a duty exists.

Butler v. State, 17 Ind., 450.
Buffalo v. Holloway, 7 N. Y., 498.
Atwood v. Welton, 57 Conn., 515.
Cane v. Chapman, 5 Ad. & El., 647.
Bailey v. Bussing, 29 Conn., 1.
Nickerson v. Bridgeport Hydraulic Co., 46 Conn., 27.
Hayden v. Smithville Mfg. Co. 29 Conn., 548.
Hewison v. New Haven, 34 Conn., 138.
Ency. of Pleading & Practice, Vol. 12, p. 1040.

An allegation of a conclusion of law in an indictment, without a statement of the facts from which such conclusion may be drawn, is insufficient. In *United States v. Hess*, 124 U. S., 483, this Court said, at p. 487: "The "object of the indictment is * * * to inform the "court of the facts alleged, so that it may decide whether "they are sufficient in law to support a conviction if one "should be had. For this, facts are to be stated, not con- "clusions of law alone."

See also:

U. S. v. Kelsea, 42 Fed., 882, 889.
U. S. v. Kessel, 62 Fed., 59, 61.
U. S. v. Post, 113 Fed., 852, 854.
Rieger v. U. S., 107 Fed., 916, 934.
People v. Cooper, 3 N. Y. Crim. Reps., 117.
W. St. L. & P. R. R. Co. v. People, 12 Ill. Appeals, 448.
State v. Paul, 69 Me., 215.

That an indictment constructed only of conclusions is insufficient must be especially true where the indictment is employed outside the jurisdiction of the trial court as evidence merely. It would be unjust in the extreme to remove a defendant a long distance from his home for a trial, upon the evidence of an indictment stating only conclusions and setting forth no facts upon which to determine whether a crime has been committed. Stripped of its conclusions as to duty and secrecy, there remains nothing in this indictment upon which a charge of crime can be based. The only material facts alleged are that an investigation was ordered by the Secretary, that Harlan and Valk were employees of the Land Office, and that Benson gave them money to procure the contents of the report.

The Government may contend that the allegation in the last paragraph of each count in the language of the statute is sufficient. In *U. S. v. Carll*, 105 U. S., 611, this Court said, by Mr. Justice Gray: "In an indictment upon a statute, it is not "sufficient to set forth the offense in the words of the stat- "ute, unless those words of themselves fully, directly and "expressly, without any uncertainty or ambiguity, set "forth all the elements necessary to constitute the offense "intended to be punished; and the fact that the statute in "question, read in the light of the common law and of other "statutes on the like matter, enables the Court to infer the "intent of the legislature, does not dispense with the neces- "sity of alleging in the indictment all the facts necessary "to bring the case within that intent."

In *U. S. v. Britton*, *107 U. S., 655, 669*, this Court held that a charge of misapplication of the funds of a national banking association was not sufficiently alleged by following the words of the statute, but that averments must be made to show how the application was made and that it was unlawful.

In *Keck v. U. S., 172 U. S., 434, 437*, the indictment charged defendant with knowingly and wilfully importing

diamonds contrary to law and with intent to defraud the United States. The indictment followed the language of the statute. This Court held the indictment bad for want of any facts to show that the importation was contrary to law.

See also:

Batchelor v. U. S., 156 U. S., 426, 429.
U. S. v. Hess, 124 U. S., 483, 487.
Evans v. U. S., 153 U. S., 584, 587.
U. S. v. Melfi, 118 Fed., 899, 902.
U. S. v. Wardwell, 49 Fed., 914.

Section 5451, R. S., does not set forth the elements necessary to constitute the offense in every case, but merely describes the general nature of the offense prohibited. It makes it a criminal act to induce a violation of lawful duty, but it does not prescribe in what such lawful duty shall consist. It is consequently essential that an indictment under this statute should not simply follow the language of the statute, but should set forth the particular matters which are relied upon as constituting the lawful duty involved and its violation, in order that the Court may judge whether, in truth, a violation of lawful duty is involved. The indictment in this case supplements the charge made in the language of the statute by specifying the act which defendant is alleged to have induced the employes of the Government to commit; but it fails, as we have hereinbefore shown, to allege facts from which the Court may determine that this act constituted a violation of lawful duty.

The reasons and principles upon which an indictment charging the crime in the words of the statute is held insufficient apply with especial force where the indictment is introduced merely as evidence in a removal proceeding.

(b) Section 5451, R. S., contemplates only a payment to induce a violation of some duty prescribed by law.

Section 5451 provides as follows:

"Every person who promises, offers or gives * * * any money or other thing of value * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any Department or office of the government thereof * * * to induce him to do or omit to do any act in violation of his lawful duty, shall be punished as prescribed in the preceding section."

The phrase "lawful duty" is equivalent to the expressions "legal duty" or "duty prescribed by law." The section does not impose a punishment for a payment to induce any and every violation of duty. The prohibition is limited and restricted to those duties which are prescribed by law. Some force must be given to the word "lawful," and if it has any function it must be that of defining and limiting the meaning of the word "duty," to legal duty, as contradistinguished from matters of morals, routine, propriety or general office discipline. The words "legal" and "lawful" are synonyms (Standard Dictionary, Webster's Dictionary, Century Dictionary). A legal duty is defined to be that which the law requires to be done or forborne (Wharton on Negligence, Section 24). The law takes no cognizance of a breach of a duty except it be a legal one, one which the law imposes (*Pennsylvania Co. v. Frana*, 13 Ill. Appeals, 98).

Unless Section 5451 is construed as limited to violations of duty constituted by law it is broader in its scope than the crime of bribery, as that crime is universally known and established. Bribery is defined by the Am. & Eng. Ency. of Law, 2d Ed., as follows: "Bribery is the giving, offering "or receiving of anything of value or any valuable service "intended to influence one in the discharge of a legal duty. "It does not apply to a mere moral duty."

Upon any other construction the statute could be reduced to an absurdity. According to the theory of the prosecution any matter of discipline, etiquette or routine of the Land Office, however trivial, whether established by verbal order, or written rule, or custom, would constitute lawful duty to induce a violation of which would be bribery, although the violation involve on the part of the clerk no official corruption whatever. Such a construction would be contrary to any reasonable application of the principle of strict construction of penal laws. The crime of bribery is an infamous crime, and the statute defining the crime of bribery should receive such construction.

The crime of offering a bribe to an official ought not to be broader in its scope than the criminal liability of an official for accepting a bribe. Section 5501, R. S., describes the circumstances under which an official shall be guilty of the crime of accepting a bribe as follows:

"Every officer of the United States, and every person "acting for or on behalf of the United States, in any official "capacity under or by virtue of the authority of any de- "partment or office of the Government thereof; and every "officer or person acting for or on behalf of either House "of Congress, or of any committee of either House, or of "both Houses thereof, who asks, accepts or receives any "money, or any contract, promise, undertaking, obligation, "gratuity, or security for the payment of money, or for de- "livery or conveyance of anything of value, with intent to "have his decision or action on any question, matter, cause "or proceeding which, may at any time, be pending, or "which *may be by law* brought before him *in his official "capacity*, or in his place of trust or profit, influenced "thereby, shall be punished as prescribed in the preceding "section."

Sections 5501 and 5451 are complementary, and Section 5451 should naturally receive a construction which would confine the crime of giving a bribe to the cases which under

a bribe. The government's construction of Section 5451 would render it a crime to offer a bribe in a vast number of cases in which the acceptance would be attended with no criminal liability under Section 5501. It cannot be thought that Congress intended to provide punishment for a person giving money to an officer, and to relieve the officer of punishment under like circumstances. The use of the word "lawful" was undoubtedly intended to avoid any such inconsistency.

United States vs. *Boyer, 85 Fed., 425,* (District Court, Western District of Missouri). This case involved an indictment for an attempt to bribe an inspector of the Department of Agriculture to induce him to withhold his condemnation of certain carcasses of cattle in the defendant's packing house, which were unfit for food. The inspector assumed to exercise his duties of inspection of the packing house by authority of an appointment and under regulations of the Secretary of Agriculture, which regulations were made pursuant to an Act of Congress authorizing the inspection of meats, cattle, etc. It was held that Congress had no power to pass such an act, and that, therefore, the regulations of the Secretary of Agriculture were without authority of law, and that the crime of bribery could not be predicated upon the offer of a reward not to perform duties for the performance of which there was no legal or constitutional warrant. The Court said at p. 436: "And the question now arises * * * whether "or not to offer a person a bribe not to do something "which no valid law enjoins him to perform is an indict- "able offense under the statute. * * * In the case at "bar, had the inspector received the bribe, it would have "been no offense against the laws of the United States, for "the reason that it was intended to induce him not to do a "thing which no valid law of Congress imposed upon him "to do." The indictment in that case was under the same section under which the present indictment is found. The

inspector was acting under instructions of the Secretary of Agriculture and under the regulations of that Department; the regulations were made in pursuance of statutory authority. The acts which it was sought to induce him to perform were violations of the regulations and of his instructions. The case is a direct and positive authority for the proposition that Section 5451 is confined to inducement of officials to do or omit to do some act in violation of a duty imposed upon them by law.

In *United States* vs. *Gibson, 47 Fed., 833* (Circuit Court, Northern District of Illinois), the defendant was indicted under Section 5451 for attempted bribery of an Internal Revenue officer to burn a distillery which was located within his jurisdiction, and which he possessed by statute the right to enter. The Court held the indictment bad, saying: "It is no part of the duty of a gauger or "any other internal revenue officer to protect the distil- "lery or any of the property therein, from violence, injury "or destruction. The only duty of such officer is to see that "the spirits produced in such distillery are made to pay "the internal revenue tax imposed upon them, and there "is no Federal statute making it a criminal offense for an "internal revenue officer to set fire to a distillery, or other- "wise destroy it. It seems, therefore, to me too clear to "require argument that, if it is not a crime under the law of "the United States for an internal revenue officer to set "fire to a distillery of his own volition or impulse, without "the influence or request of another, then it is not a crime "against the United States for another person to bribe "him to do it. The statute I have quoted makes it a crime "against the United States for anyone to offer to bribe "an officer of the United States * * * to induce him "to do or omit to do an act in violation of his lawful duty; "but to bribe or induce such an officer to do an act not con- "nected with his line of duty impinges upon no United "States law and does not subject the offender to indictment

"and punishment in the United States Courts * * *
"Stress seems to be laid in the indictment upon the fact
"that the internal revenue officer mentioned in it had
"the right, by virtue of his office, to enter the distillery
"which was to be set on fire. This right of entrance may
"have made this officer a convenient person for the pur-
"poses of the defendant, if the defendant wished to have the
"distillery set on fire, but it no more brought the con-
"templated offender within the Federal cognizance than if
"the officer had been influenced by a bribe from defendant
"to murder another person who was within the distillery,
"and whom the officer could more readily have obtained
"access to by reason of his right to enter." The words of the above quotation from the Gibson case are precisely applicable to the present case; if it is not a crime under any law of the United States for a clerk in the General Land Office to divulge the contents of a Special Agent's report then it is not a crime against the United States for another person to offer him an inducement for doing it. This case is also positive authority in favor of the construction of Section 5451 for which we contend. The Government charges that by reason of the convenient access which was possessed by Harlan and Valk to the records of the General Land Office, it was a violation of their duty to reveal the contents of any of those records. It was contended by the Government in the Gibson case that by reason of the statutory authority which the inspector possessed to enter the distillery, it was a violation of his lawful duty, within the meaning of the statute, to burn the distillery, and this contention was held unsound.

In *In re Palliser*, 136 U. S., 257, the defendant was indicted under Section 5451 for attempted bribery of a postmaster to sell postage stamps on credit, and a proceeding was instituted for his removal from the Southern District of New York to the District of Connecticut for trial. The case came before this court on habeas corpus. This Court

considered the sufficiency of the indictment and held that the indictment was good, relying upon an Act of Congress prohibiting the sale of postage stamps by a postmaster except for cash. The Court said, at p. 264: "The promise "to a public officer that if he will do a certain unlawful "act he shall be paid a certain compensation is an offer "to bribe him to do an unlawful act." Apparently from this quotation this Court in the Palliser case construed Section 5451 as confined to the inducement of officials to do acts which are unlawful.

(c) *No law is alleged or exists prescribing that it shall be the duty of clerks in the General Land Office to maintain secrecy in reference to reports of Special Agents.*

There is no reference in the indictment to any law making the reports of Special Agents secret. No such reference could be made, for no law of that character exists.

Macey, the Chief Clerk of the Land Office, was called as a witness for the Government. He testified that in the due course of business such reports were secret and confidential (Rec., p. 40), and that it would be contrary to the duty of any clerk in the office to divulge the contents of such reports (Rec., pp. 43, 46). This testimony added nothing to the indictment. It was no more than a statement of his conclusions. Upon his cross-examination (Rec., pp. 47 to 52) he stated that he knew of no statute or rule or regulation establishing any such duty. Harlan, a Government witness, testified (Rec., p. 142) that he knew of no statute of the United States making it the duty of agents to keep those matters secret. Counsel for the Government was unable to cite any act of Congress upon the point in question.

(d) There is no allegation of any rule, regulation or order prescribing that it shall be the duty of clerks in the

Land Office to maintain secrecy in reference to reports of Special Agents, or making such reports secret and confidential, and the Government's evidence shows that no such rule, regulation or order existed.

The indictment is devoid of any allegation that a rule, regulation or order had been promulgated by the Secretary of the Interior or by the Commissioner of the General Land Office prohibiting the disclosure of contents of Special Agents' reports, or of any other records of the Department or of the General Land Office. The indictment alleges that the report when transmitted to the Secretary of the Interior would be for the exclusive consideration and use of the proper officers of the Department of the Interior and of the General Land Office. It does not allege that the Secretary of the Interior or any other person in authority so ordered. The indictment alleges specifically that Harlan's duties as chief of the Special Service Division were to protect the public lands, to supervise the work of Special Agents, prepare instructions to such Special Agents and receive their reports. It does not allege that his duties were defined by any rule or regulation, and this fact cannot be properly implied from the allegation that he was "acting on behalf of the said United States in an official function under and by authority of the said Department, under the laws and the regulations theretofore and then pursuant to law prescribed and promulgated by the Secretary of the Interior of the said United States." But even if this inference could be drawn the fact that he was charged with the designated duties has no tendency to prove that there was any rule regulation or order of the Department enjoining secrecy in department and office matters.

The testimony of the Government's own witnesses affirmatively shows that no such rule, regulation or order existed. Chief Clerk Macey testified (Rec., pp. 47, 52) that he knew of no statute, or rule, or regulation as to Har-

lan's duties; that if there was such a rule or regulation he would know it; that he did not think there were any written instructions from the Secretary in regard to the duties of clerks and employees in the Land Office, or any written rules or regulations of the Commissioner of the General Land Office in reference thereto; that when he testified to the duties of such employees he was speaking of duties which are prescribed orally or by general custom or practice in the office (Rec., pp. 50, 51); that he did not know of any general verbal instructions about the duties of clerks, but that the clerks were subject to orders from day to day (Rec., p. 51).

Harlan testified that he knew of no written rule or regulation of the Department making secrecy a duty in these matters; that it was the rule and practice of the office and that the practice was established by oral declarations of the Commissioner in individual cases when people applied for permission to examine the records (Rec., pp. 143, 144).

(e) *If it can be presumed in the absence of definite allegations to that effect, and in the face of the evidence to the contrary, that some rule or regulation had been prescribed and promulgated by the Secretary of the Interior or the Commissioner of the General Land Office, prohibiting the publication of the contents of Special Agents' Reports, nevertheless, such a rule, regulation or order, even if formally promulgated, could not in any event lay the basis for a criminal prosecution.*

Although the indictment does not allege that reports of Special Agents were declared to be secret and confidential by any rule, regulation or order of the Secretary of the Interior or Commissioner of the General Land Office, or that employees of the department were prohibited to publish the contents of reports by any such rule or regula-

tion, and although the evidence shows that no such rule or regulation existed, nevertheless, if the promulgation of rules and regulations in the premises be assumed, they would not create a lawful duty, an inducement to violate which would furnish a foundation for a conviction of bribery. Assuming for the sake of argument that a positive prohibition of publication by any employee of the contents not only of reports and records in general, but of this particular report, had been made by the Secretary of the Interior or the Commissioner of the General Land Office and promulgated with the formality necessary to constitute it a regulation of the department, nevertheless, under the decisions of this Court a crime could not be predicated upon the violation of that regulation.

Congress may delegate power to department officers to make regulations, which, if made pursuant to that authority and in supplement of the Act of Congress, will have the force of law. In *In re Kollock, 165 U. S., 526,* it appeared that Congress had authorized the Commissioner of Internal Revenue to prescribe the brands and marks for oleomargarine and declared it a crime to sell oleomargarine not so marked. It was held that violations of the regulations of the Commissioner in this respect constituted a crime since the crime was declared by Congress and the department regulation was merely in execution thereof or supplementary thereto.

But regulations made by an executive officer or department not thus specifically authorized by Congress cannot form the basis of a criminal prosecution, when Congress has not specifically declared that their violation shall be criminal. Congress cannot delegate its power to prescribe what acts or omissions shall constitute crimes. In *United States* vs. *Eaton, 144 U. S., 677,* a violation of a department regulation was involved. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, had prescribed a regulation requiring

all wholesale dealers in oleomargarine to keep a book in a certain form and make monthly returns showing the oleomargarine received and its disposition. This regulation was made pursuant to an Act of Congress regulating the manufacture, sale, etc., of oleomargarine, which contained a provision, Section 18, that "If any manufacturer of oleomargarine, any dealer therein or any importer or exporter thereof, shall knowingly and wilfully neglect, omit or refuse to do, or cause to be done, any of the things required by law in the carrying on or the conducting of his business, or shall do anything by this Act prohibited, if there be no specific penalty or punishment imposed by any other section of this Act for the neglecting, omitting or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of $1,000." Another provision of the act authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make all needful regulations for the carrying into effect of this act. The question before this Court was whether the failure of a wholesale dealer in oleomargarine to keep books and render returns as prescribed by the regulation of the Commissioner rendered him liable to the penalty prescribed by Section 18, in having omitted or failed to do a thing "required by law in the carrying on or conducting of his business," within the meaning of that section. It was held by this Court that the regulation prescribed by the Commissioner of Internal Revenue, under the general grant of authority, was not sufficient to subject one violating it to punishment under Section 18. The Court said, p. 687: "It was said by this "Court in *Morrill* vs. *Jones, 106 U. S., 466, 467*, that the "Secretary of the Treasury cannot by his regulations alter "or amend a Revenue law, and that all he can do is to "regulate the mode of proceeding to carry into effect what "Congress has enacted * * * Much more does this "principle apply to a case where it is sought substantially

"to prescribe the criminal offense by the regulation of a "Department. It is a principle of criminal law that an "offense which may be the subject of criminal procedure "is an act committed or omitted 'in violation of a public "law either forbidding or commanding it' (4 Am. & Eng. "Encyc. of Law, 642; 4 Bl. Com., 5). It would be a "very dangerous principle to hold that a thing prescribed "by the Commissioner of Internal Revenue as a needful "regulation under the Oleomargarine Act, for carrying it "into effect, could be considered as a thing 'required by "law' in the carrying on or conducting of the business of a "wholesale dealer in oleomargarine in such manner as to "become a criminal offense punishable under Section 18 "of the Act. * * * It is necessary that a sufficient statu- "tory authority should exist for declaring any act or "omission a criminal offense; and we do not think that the "statutory authority in the present case is sufficient. If "Congress intended to make it an offense for wholesale "dealers in oleomargarine to omit to keep books and ren- "der returns as required by regulations to be made by the "Commissioner of Internal Revenue, it would have done "so distinctly in connection with an enactment such as "that above recited, made in Section 41 of the Act of Oc- "tober 1, 1890. Regulations prescribed by the President "and by the heads of departments under authority granted "by Congress may be regulations prescribed by law, so as "lawfully to support acts done under them and in accord- "ance with them, and may thus have in a proper sense the "force of law; but it does not follow that a thing re- "quired by them is a thing so required by law as to make "the neglect to do the thing a criminal offense in a citizen, "where the statute does not distinctly make the thing in "question a criminal offense."

See also *United States* vs. *Maid, 116 Fed., 650.*

In *United States* vs. *Manion, 44 Fed. R., 800,* an indict-

ment for perjury was involved, the oath being one required by the regulation of the Commissioner of the Land Office. A demurrer to the indictment was sustained, the Court saying. "Perjury can only be assigned upon an oath au- "thorized by a law of the United States. "Law,' according "to the most familiar definition of that term, is a rule pre- "scribed by the supreme power in the nation. Now, the "Commissioner of the General Land Office is not the su- "preme power in the United States. He does not create the laws of the United States, and he cannot be endowed with "power to do so * * * he may exact from all who "transact business in his bureau * * * compliance with "the rules and regulations which he is authorized to make, "but he cannot prescribe a rule which can have the force "of a law in the United States, and the violation of which "can be punishable as a felony."

The broad principles declared in the foregoing cases that a crime cannot be predicated upon a mere regulation of a department officer not deriving its validity from the authority of Congress, is conclusive in this case. Section 5451 declares it bribery to induce another to commit an act in violation of his lawful duty. His lawful duty can be constituted only by authority of Congress. Violation by an employee of department orders and regulations may subject the employee to discipline or dismissal, but cannot subject him to criminal prosecution, and no violation by an employee of any such regulation is a violation of the employee's lawful duty within the meaning of Section 5451.

(f) The record shows, at most, that if the report of the special agents should be made, and if it should thereafter be filed in the Land Office, Harlan and Valk might have had access thereto, and that it would be contrary to the practice of the General Land Office to reveal its contents. But bribery cannot be predicated upon such premises.

Reduced to the last analysis, the above is the whole case of the Government. The proposition is simply that because it was the practice in the Land Office not to permit the public to examine special agents' reports, and because Harlan and Valk might, by reason of their employment, have access to the reports when, and if, they should be referred to that office, it was their lawful duty to keep the report secret, and that to offer them a consideration to reveal the contents of the report would be bribery. Even this proposition depends upon two conditions, namely, first, that the report should be made, and second, that it should be referred by the Secretary of the Interior to the Land Office and there filed; unless these conditions should be fulfilled, none of the employees would ever have access to it. The mere statement of this proposition is sufficient to show how utterly unfounded is the Government's case.

The fact testified by Harlan (Rec., p. 143) that the Commissioner usually refused applications for examination of special agents' reports, may have implied to the clerks who had any official functions to exercise over such reports a moral duty to keep them secret, and the publication thereof under such circumstances might involve a breach of morals, or honor, or office discipline. But while, as alleged in the first three counts, Harlan, when acting as Chief of the Special Service Division, had supervision of the special agents' reports on investigations initiated by him, it does not appear that this report to the Secretary of the Interior would ever be within his official functions, and it affirmatively appears that at the times alleged in these first three counts the report was not in existence. The remaining counts rest solely upon the allegations that Harlan and Valk were clerks in the office, and so would have access to any of the office records; but it appears that they would have no official function to exercise regarding special agents' reports.

Even as to Harlan's position as Chief of the Special

Service Division, it is preposterous to contend that it would constitute a violation of a lawful duty for him to reveal the contents of the report, since no law exists imposing this duty upon him. Such a contention could be extended to the most astounding lengths. This contention, logically pursued, would include the proposition that any trivial temporary orders or instructions made by Department or Bureau officers from day to day in the enforcement of office discipline would constitute the lawful duty of employees, and therefore, lay the foundation for a prosecution and conviction for an infamous crime.

And the proposition that because Harlan and Valk had access to the reports, it was a violation of their lawful duty to disclose their contents, is more than preposterous. Their act would not be an act committed in their official capacity in any case brought before them *by law,* and therefore, they would not be guilty of the crime of accepting a bribe under Section 5501. Where it is no crime to accept a bribe, it is no crime to give it. To constitute the crime of bribery the act induced must be one done in the course of the official's lawful duty and in his official capacity. If the appellant had hired some person not connected with the Government service to break and enter the Land Office and steal the report, the inducement would not have constituted bribery. And to hire an employee of the office to obtain information of a report which is not within the employee's jurisdiction of official functions, does not differ in principle. Harlan testified (Rec., p. 139) that he had no access to any report after April in the ordinary course of business; that he expected to get it from Mr. Steece, one of the special agents, and that in so doing his act would have been outside of his duty as a clerk in the Land Office. He testified as to the December transaction that he presumed he could not obtain the stenographer's notes of the investigation unless he stole them (Rec., p. 132). An employee of the office would undoubtedly be

a more convenient agent for such a purpose than a person not connected with the office, because of his greater opportunity for access to the reports; but this does not bring the person dealing with such employee within the bribery law.

United States v. *Gibson*, 47 *Fed.*, 833.

This indictment is founded on the principle which received this Court's condemnation in the Eaton case, *supra*. There is was sought to impose on a dealer in oleomargarine a fine for violation of a formal regulation of the Commissioner of Internal Revenue. Here it is sought to imprison the appellant for inducing an employee to violate what is said to be a custom or practice of the Land Office. In the Eaton case, Congress had empowered the Commissioner to make the regulation in question. In this case, the alleged practice in the Land Office is constructed upon verbal rulings and directions of the Commissioner—not authorized by Congress. In the Eaton case, Congress had prescribed a fine for the omission of a thing required by law of a dealer in oleomargarine. Here Section 5451 prescribes imprisonment as the punishment for inducing a violation of an official's lawful duty. Yet the Court held in the Eaton case that it would be a dangerous principle to consider things prescribed by the formal regulations of the Commissioner of Internal Revenue as things required by law, in such a manner that their breach could be treated as a criminal act and subject the offender to a fine. How then can it be contended that a practice or custom of the Land Office can create a lawful duty, such that one who induces another to violate that custom can be held guilty of a crime and subjected to imprisonment?

POINT FIFTH.

Section 1014 R. S. does not authorize a removal to the District of Columbia. The District of Columbia is not a district and the Supreme Court of the District of Columbia is not a Court of the United States, within the meaning of that section. Appellant being committed for removal to the District of Columbia, is, therefore, deprived of his liberty without due process of law.

It requires no argument to show that the appellant's detention for removal to the District of Columbia for trial in the Supreme Court thereof, if no law sanctions such a removal from one of the Federal judicial districts, is a deprivation of liberty without due process of law.

Section 1014, R. S., which is the only authority asserted for this removal proceding, reads as follows:

"Sec. 1014. For any crime or offense againat the "United States the offender may, by any justice or judge "of the United States, or by any commissioner of a Circuit "Court to take bail, or by any chancellor, judge of a Su- "preme or Superior Court, chief or first judge of Common "Pleas, mayor of a city, justice of the peace, or other "magistrate, of any State where he may be found, and "agreeably to the usual mode of process against offenders "in such State, and at the expense of the United States, "be arrested and imprisoned, or bailed, as the case may "be, for trial before such court of the United States as by "law has cognizance of the offence. * * * And where "any offender or witness is committed in any district other "than that where the offense is to be tried, it shall be the "duty of the judge of the district where such offender or "witness is imprisoned, seasonably to issue, and of the "marshal to execute, a warrant for his removal to the dis- "trict where the trial is to be had."

The section does not authorize arrest for trial in State, territorial or municipal courts, nor does it authorize removal to any locality that is not organized as a district of the Federal judicial system.

Section 1014 R. S., is taken from Section 33 of the Judiciary Act of 1789 (1 Statutes at Large, page 91).

Section 33 of the Judiciary Act provided that

"for any crime or offense against the United States, the of-
"fender may, by any justice or judge of the United States,
"or by any justice of the peace, or other magistrate of any
"of the United States where he may be found, agreeably
"to the usual mode of process against offenders in such
"State, be arrested, and imprisoned or bailed, as the case
"may be, for trial before such court of the United States
"as by this act has cognizance of the offense. And
"copies of the process shall be returned as speedily as
"may be into the clerk's office of such court, together with
"the recognizances of the witnesses for their appearances
"to testify in the case, which recognizances the magis-
"trate before whom the examination shall be, may re-
"quire on pain of imprisonment. And if such commit-
"ment of the offender or the witnesses shall be in a dis-
"trict other than that in which the offense is to be tried,
"it shall be the duty of the judge of that district where the
"delinquent is imprisoned, seasonably to issue, and of the
"marshal of the same district to execute, a warrant for
"the removal of the offender and the witnesses, or either
"of them, as the case may be, to the district in which the
"trial is to be had. And upon all arrests in criminal
"cases, bail shall be admitted, except when the punish-
"ment may be death, in which case it shall not be ad-
"mitted but by the Supreme or a Circuit Court, or
"by a justice of the Supreme Court, or a judge of a
"District Court, who shall exercise their discretion therein
"regarding the nature and circumstances of the offense,
"and of the evidence and the usages of law. And if a
"person committed by a justice of the Supreme or a judge
"of a District Court for an offense not punishable with
"death, shall afterwards procure bail, and there be no
"judge of the United States in the district to take the
"same, it may be taken by any judge of the Supreme or
"Superior Court of law of such State."

A comparison of this section of the Judiciary Act with Section 1014, R. S., shows that they are substantially the same, except that Section 33, Judiciary Act, provides for arrests and removals for trial "before such court of the United States as by this act has cognizance of the offense," while Section 1014, R. S., provides for arrests and removals for trial "before such court of the United States as by law has cognizance of the offense," and except that Section 33, Judiciary Act, contained provisions regarding admission to bail in criminal cases which are not contained in Section 1014, but are continued in Sections 1015 and 1016, R. S.

The districts which were within the contemplation of Section 33 of the Judiciary Act were obviously only the Federal judicial districts into which the United States was divided by the Judiciary Act, and the courts of the United States which were within the contemplation of that section were only the Circuit and District Courts of the Federal judicial system created by that Act. The provision of Section 33, expressly limiting the scope of the section to arrests and removals having as their object a trial in some court created by the Judiciary Act conclusively shows that the phrase "courts of the United States" therein employed was intended to include only the circuit and district courts of the Federal judicial system created thereby.

(a) *The District of Columbia did not exist at the time of the enactment of Section 33 of the Judiciary Act and was not, therefore, within its contemplation. It has never been constituted or included within one of the Federal judicial districts and is not, therefore, within the provisions of the present section.*

By Act of February 21, 1871, 16 Statutes, 426, the District of Columbia was created a body corporate for municipal purposes. By the Act of June 11, 1878, 20 Statutes, 102, it was provided that the District of Columbia shall remain and continue a municipal corporation.

See also *District of Columbia* vs. *Woodbury*, 136 U. S., 450; *Metropolitan Railroad Co.* vs. *District of Columbia*, 132 U. S., 1.

The District of Columbia is not, therefore, a district to which offenders elsewhere arrested in the United States may be removed for trial under Section 1014, unless the District of Columbia has been brought within the provisions of Section 1014 by some subsequent legislation. The only Acts of Congress which are claimed to have had that effect are the Act of February 21, 1871, 16 Statutes, 426, and the Act of June 22, 1874, §396 (18 Stat., 193). The former Act, that of February 21, 1871, Chapter 62 (Section 93, Revised Statutes of the District of Columbia) provides as follows:

"The Constitution and all laws of the United States "which are not locally inapplicable shall have the same "force and effect within the District of Columbia as else- "where within the United States."

Judge Lacombe in this case below concurred in the contention that the word "district" as used in the original enactment of this section, applied to the judicial districts into which the United States was divided by the Judiciary Act, but concluded that the section of the Act of 1871 above quoted made the provisions of Section 1014 applicable to the District of Columbia and authorized a removal from one of the judicial districts thereto. Judge Lacombe said: "This places the District of Columbia, so far as practi- "cable, on an equality of privilege with the various States "and judicial districts of the rest of the country. One of "the privileges of a judicial district is to have persons who "within its borders offend against the laws of the United "States returned from any other district to itself for trial "before the appropriate Federal Court sitting therein. "That privilege is made practically available by Section "1014, and by the Act of 1871 the provisions of that section " 'have the same force and effect within the District of Co-

"lumbia as elsewhere in the United States'" (130 Fed. Rep., 488; Rec., p. 206).

The language of the Act of 1871 does not justify the conclusion of the learned Judge below. The provisions of the 33d Section of the Judiciary Act were locally inapplicable to the District of Columbia, because that section referred only to judicial districts of the United States, and the District of Columbia did not come within that description. The express terms of the Act of 1871 preclude the possibility of this construction. It provides that all laws not locally inapplicable shall have the same force and effect *within* the District of Columbia as elsewhere. But the granting of a warrant of removal under Section 33 of the Judiciary Act in the Southern District of New York, or some other judicial district, is manifestly not giving the provisions of that section force and effect within the District of Columbia. It might with more reason be argued that to arrest an offender in the District of Columbia under this section for removal to some other jurisdiction would be giving the provisions of Section 33 of the Judiciary Act force and effect *within* the District of Columbia. But the language of the Act of 1871 is not capable of even this construction.

The subsequent enactment of the Act of June 22, 1874, conclusively shows that it was not the understanding of Congress that the Act of 1871 extended the application of Section 33 of the Judiciary Act to the District of Columbia, even to the extent of authorizing the arrest of offenders within the District of Columbia for removal to other jurisdictions. The Act of June 22, 1874, Section 2, provides as follows:

"The provisions of the thirty-third section of the Ju-
"diciary Act of seventeen hundred and eighty-nine shall
"apply to courts created by Act of Congress in the Dis-
"trict of Columbia."

Had it been intended or supposed by Congress that

the removal statute was made applicable to the District of Columbia in any respect by the Act of 1871, the section of the Act of 1874 last quoted would not have been enacted. The error in the opinion of the Court below in this respect is, therefore, apparent.

But even this Act of 1874 does not make the provisions of the 33rd Section of the Judiciary Act or its successor, Section 1014, R. S., in all respects or for all purposes applicable to the District of Columbia. It may grant to the judges of the courts created by Act of Congress in the District of Columbia power to arrest and remove offenders there found for trial in other jurisdictions. It undoubtedly applies the provisions regarding the admission to bail contained in the 33rd Section of the Judiciary Act, which were omitted in the enactment of Section 1014, R. S., to the courts of the District of Columbia; but it does not authorize the removal of persons arrested in some judicial district of the United States to the District of Columbia.

This Act of June 22, 1874, Chapter 396, was approved on the same day as the Revised Statutes containing Section 1014. The Revised Statutes were a consolidation and revision of the statutes in force on December 1, 1873 (Section 5595, R. S.). Section 5601, R. S., provides: "The enactment of the said revision is not to affect or re-"peal any Act of Congress passed since the first day of "December, One thousand eight hundred and seventy-"three, and all Acts passed since that date are to have "full effect as if passed after the enactment of this re-"vision, and so far as such Acts vary from or conflict "with any provision contained in said revision, they are "to have effect as subsequent statutes and as repealing "any portion of the revision inconsistent therewith." The Act of June 22, 1874, Chapter 396, does not refer to Section 1014, R. S., but to Section 33 of the Judiciary Act; and since the provisions of Section 33 differed from the

provisions of Section 1014, R. S., it must be presumed by virtue of Section 5601, R. S., above quoted, that this Act intended to make applicable to the courts of the District of Columbia the provisions of the Thirty-third Section of the Judiciary Act rather than the provisions of its successor, 1014, R. S. And the provisions of Section 33 of the Judiciary Act which were most applicable to the courts of the District of Columbia are those provisions regarding admission to bail in criminal cases, which are not embodied in Section 1014, R. S.

By Section 5596, R. S., the provisions of Section 33 of the Judiciary Act were repealed, and Section 1014, R. S., came into force in lieu thereof, in the Federal judicial districts, and the courts of those districts became subject to the provisions of Section 1014, R. S., as to removals. But it was seen that there was thus no provision of law applicable to District of Columbia courts in removal cases before those courts. Therefore, Congress passed c. 396 of the Laws of 1874, providing that Section 33 of the Judiciary Act shall apply to courts of the District of Columbia. This being enacted after December 1, 1873, had and has full effect upon District of Columbia courts. Hence, a proceeding in one of those courts is governed by Section 33, and a proceeding in a court of a Federal district is governed by Section 1014, R. S. And if, as we contend, Section 1014, R. S., does not authorize a Federal district court to remove a prisoner to the District of Columbia, its jurisdiction to perform such an act is in no way extended by c. 396 of 1874.

Furthermore, by the enactment of Chapter 396 of 1874, Congress interpreted Section 1014, R. S. Congress recognized that the District of Columbia not being a Federal district, was not within the scope of Section 1014, R. S. For if it had been considered by Congress that 1014, R. S., applied to the District of Columbia, there would have been no need to enact Chapter 396 of 1874. The fact that Con-

gress made an insufficient law to provide for removal of prisoners to the District of Columbia, in no way affects its recognition of the defect in Section 1014, R. S.

Less than six months after the above Act of 1874, Chapter 396, was enacted, the United States Senate adopted a resolution instructing the Committee on the Judiciary to inquire into the extent and meaning of the Act of June 22, 1874, c. 396, and particularly whether under the provisions of that Act, persons charged with libel or other crime in the District of Columbia could be brought from a State or other place within the Federal jurisdiction to said District of Columbia to answer therefor.

We have been informed that this resolution arose out of the then existing political conditions, it having been proposed to bring into the District of Columbia many newspaper editors who were accused of libelling officers of the administration. The subject of the resolution was considered of great importance, and the action of the Judiciary Committee upon the resolution was by no means perfunctory.

On February 16, 1875, the Judiciary Committee of the Senate, consisting of Senators Edmunds, Conkling, Frelinghuysen, Wright, Thurman and Stevenson, reported that the Act of June 22, 1874, confers on the District of Columbia courts the power to arrest offenders found in the District, who have committed crimes against the United States in some judicial district of the United States, and to send them to such district for trial; but that no person can be brought into the District of Columbia under the provisions of this Act, either for libel or any other crime. In the opinion of the Committee, the 33d Section of the Judiciary Act embraced only the judicial districts of the United States created by Acts of Congress in the several States.

For the convenience of the Court, we take the liberty of quoting herewith in full the report of the Judiciary Committee.

43d Congress 2d Session. SENATE. Report No. 658.

IN THE SENATE OF THE UNITED STATES.

February 16, 1875. Ordered to be printed.

Mr. Edmunds, from the Committee on the Judiciary, submitted the following

REPORT:

The Committee on the Judiciary respectfully report:

That on the 15th of December, 1874, the Senate adopted the following resolution:

Resolved, That the Committee on the Judiciary be instructed to inquire into the extent and meaning of the Act of June 22, 1874, entitled "An Act conferring jurisdiction upon the criminal court of the District of Columbia, and for other purposes," and particularly whether under or by its provisions persons charged with or indicted for libel or other crime in the said District of Columbia, can be brought from a State or other place within Federal jurisdiction to said District, to answer therefor; and, also, whether said act has any application to prosecution or indictment for the crime of libel in any case, and report thereon.

In obedience to this resolution the committee have carefully examined the subject.

The Act of June 22, 1874, entitled "An Act conferring jurisdiction upon the criminal court of the District of Columbia, and for other purposes," is in the following words:

"Be it enacted by the Senate and House of Represen-"tatives of the United States of America in Congress as-"sembled, That the criminal court of the District of Co-"lumbia shall have jurisdiction of all crimes and misde-

"meanors committed in said District not lawfully triable "in any other court, and which are required by law to be "prosecuted by indictment or information.

"Sec. 2. That the provisions of the thirty-third section "of the judiciary act of seventeen hundred and eighty-nine "(1789), shall apply to courts created by act of Congress "in the District of Columbia."

It having been considered that the provision in the Act of June 17, 1870, establishing a police court in the District of Columbia, which conferred exclusive jurisdiction upon it of "all offences against the United States not deemed capital or otherwise infamous," and which did not provide for trials by jury, were in violation of of that clause in the Constitution which declares that "the trial of all crimes except in cases of impeachment, shall be by jury," the first section of the act above quoted was passed in order to prevent a failure of justice in respect of a large class of crimes committed in the District, by giving the criminal court, with its jury, jurisdiction of such of them as under the Constitution could not, for the reason already stated, lawfully be tried in the police court.

By the second and only other part of the act in question it is declared "that the provisions of the thirty-third section of the Judiciary Act of seventeen hundred and eighty-nine (1789), shall apply to courts created by act of Congress in the District of Columbia."

The thirty-third section of the Act of 1789 referred to is in the following words:

(Quoting section in full.)

As the Act of June 22, 1874, mentioned in the resolution of the Senate, only extended to the courts of the District of Columbia the provisions of the section just quoted, it follows that the inquiry is reduced to the simple question, what are the provisions of that section

which has been the law of the land for more than eighty years.

They are simple and clear.

1st. The crime or offense upon which the section acts must be one against the United States.

2d. The offender can only be arrested upon the warrant of a court or judge of the State or district where he may be found. No court or judge can issue a warrant to arrest the offender in any other State or district.

3d. If the offender be thus arrested for an offense against the United States, and be brought before the court or judge of the district where he was arrested, he may be held for trial before such court of the United States as, by the Act of September 24, 1789, had cognizance of the offense.

4th. The only courts having cognizance of any offense or case by that act are:

1. The Supreme Court of the United States.

2. The Circuit Courts of the United States established in the various States.

3. The District Courts of the United States established in the various States.

No State court and no territorial court has by that Act any jurisdiction whatever for the trial of any cause, civil or criminal.

If it appears, when the offender is thus arrested and brought before the court or judge of the district of his arrest, that the offense was committed in some other district, it is made the duty of the judge to cause him to be removed to the district in which the offense was committed; the Constitution requiring all criminal trials to be in the district in which the offense was committed. It is scarcely necessary to say that the districts mentioned are

the judicial districts of the United States created by Acts of Congress in the several States.

The section gives no power to a court or judge to send for or bring a person charged with crime *into* his district or jurisdiction under any circumstances. The authority given in this respect is only to remove the person charged *from* the district in the cases named.

The sum of the matter, therefore, is, that the second section of the Act of June 22, 1874, confers upon the courts of the District of Columbia the power to arrest offenders found in the District who are charged with crime committed within the District, and hold them for trial (which was the law before), and to arrest offenders found in the District who have committed crimes against the United States in some judicial district of the United States, and to send them to such district for trial. And that is all. No person can be brought into the District of Columbia under it, either for libel or any other cause, and the committee are of opinion that both the sections of the Act are necessary and proper, and in perfect accordance with the principles of justice and the course of civilized jurisprudence. Without provisions of this character the District of Columbia would be an asylum for offenders committing crimes against the laws of the United States and escaping hither.

It only remains to report, as directed by the resolution of the Senate, "whether said Act has any application to prosecution or indictment for the crime of libel in any case."

We are of opinion that, as before stated, no person charged with the crime of libel can be brought into the District of Columbia under it, for no person can be brought here under it for any crime whatever.

And it is equally plain that no person charged with the crime of libel in any other district or place in the United States can be arrested here and sent to such district or place under it, for,

1st. Libel is not a crime against the laws of the United States in any of the States, so that no case could arise in which a court or judge in the District of Columbia could be called upon to arrest a person here and send him to any State for trial for libel.

It should be here observed that the jurisdiction of the courts of the United States in criminal cases is confined to offenses created by the statutes of the United States.

No offense at common law is indictable or triable in the courts of the United States. This was early determined by the Supreme Court of the United States, and is the settled law of the land (Public Statutes, United States vs. Hudson, 7 Cranch., p. 32; Bishop's Criminal Law, Sec. 199).

2. If in any Territory libel is a crime by its laws, and if such laws could be held for such purposes to be the laws of the United States, the Act under consideration provides no aid in sending a person from this District to such Territory, for the 33d Section of the Act of 1789 has no application whatever to the Territories.

The result is that the Act of June 22, 1874, is not, in our opinion, obnoxious to any criticism; and, in respect of the crime of libel, it confers no power either to bring a person charged with it into the District of Columbia or send him out of it.

GEO. F. EDMUNDS.
ROSCOE CONKLING.
FREDK. T. FRELINGHUYSEN.
GEO. G. WRIGHT.
A. G. THURMAN.
J. W. STEVENSON.

We submit that no better expression of legislative intent could be desired or imagined than is contained in the foregoing report of the Senate Judiciary Committee.

The most thorough consideration of this question by any Court is that of District Judge Brown of the Southern District of New York, *In re Dana*, 68 Fed., 886, 898. That case was before the District Judge on an application for the removal of Charles A. Dana to the District of Columbia for trial on an indictment for libel. The warrant of removal was refused. It is true that Judge Brown decided that libel was not a removable offense, but his careful and extended consideration of the question of the right to remove a person to the District of Columbia for any crime entitles his opinion upon this point to great weight. Judge Brown reached the conclusion that the District of Columbia is not a District to which offenders can be removed under Section 1014, and that the operation of that section has not in this respect been extended by the Act of June 22, 1874. Judge BROWN said, at page 900:

"The scope and aim of the Judiciary Act were mani-
"festly purely federal and national. * * * The only
"subject of consideration was the national federal courts
"and trials in those courts alone.

* * * * * * *

"At that time a territorial government and territorial
"Courts had been organized under the Ordinance of 1787
"in the Northwest Territory. But no one would contend
"that mere local offenses committed in that territory, and
"not embraced in any general legislation of Congress, were
"removable offenses under the Judiciary Act, any more
"than that its territorial Courts were 'Courts of the
" 'United States' in the sense of the Judiciary Act or of
"ordinary legislation. When the District of Columbia
"was afterwards acquired, its Courts and local offenses
"under the local law alone, were in the same category as
"those of the territories. That none of those Courts were
" 'Courts of the United States' in the sense of ordinary
"legislation has been long adjudicated, because they do
"not belong to the Federal system, and are not Courts of

"the Constitution, nor created under the judicial power, "but under a separate authority in the Constitution, to "make 'all needful rules and regulations for the terri- "tories' (Art. 4, Sec. 3), and to 'exercise exclusive legis- "lation over the seat of government.' (Art. 1, Sec. 8.)

* * * * * * *

"That offenses under the local law of the District of "Columbia are not embraced in Section 33, also results "necessarily from its particular provisions. The commit- "ment and removal are by that section required to be (1) "to the proper 'district,' *i. e.*, to one of the Federal judic- "ial districts; and the District of Columbia is not such a "district; * * * (2) for trial of a 'Court of the United "States,' which (3) has cognizance of the offense by virtue of "'that act'; and the courts of the District of Columbia, "as above stated, are neither 'courts of the United States' "in the sense of the Judiciary Act nor do they derive "their authority from the Judiciary Act."

Judge BROWN said, in reference to the Act of 1874:

"The statue last cited is so vague that it is difficult to "determine its intention or effect. It is more noticeable "for what it omits than what it contains. It does not "make the District of Columbia a Federal District; nor "declare that offenders may be removed thither in like "manner as to other Federal Districts, nor removed "thither for violation of the local law, nor does it pur- "port to enlarge the class of offenses contemplated by "Section 33. It is, therefore, immaterial here. It does "not even make the provisions of Section 33 applicable in "general to the district; but only to 'courts created by "Congress in the District of Columbia.' No one court is "specified. It extends, therefore, to all the courts, from "the highest to the lowest. What provisions of Section "33 can be made applicable to all the courts of the Dis- "trict of Columbia? Apparently, those only by which "all the judges and magistrates of the courts in the sev-

"eral states are authorized to act as committing magis-
"trates. This, I think, is its only effect, and it has been
"so held by Treat, J. See *In re* Buell, 3 Dillon, 116."

Judge Brown quoted the report of the Senate Judiciary Committee and concurred in its conclusions, and further expressed the opinion that the enactment of Section 1014 on the same day as the Act of June 22, 1874, warranted the inference that Section 1014 was not intended or understood by Congress to apply to the District of Columbia.

In *United States* v. *Burr*, 25 Fed. Cas., No. 14,674a, Mr. Chief Justice Marshall, sitting as a committing magistrate in Virginia, refused to commit the defendant for removal to the Territory of Mississippi upon the ground that he possessed no power to commit for removal to a territory.

In *United States* v. *Guiteau*, 1 Mackey, 563, Judge Cox held that Section 731 R. S., providing for the trial of offenses begun in one judicial circuit and completed in another, had no application to offenses commenced in the District of Columbia and completed in a state, since the District of Columbia is not a judicial district. Judge Cox considered also the effect of the Act of February 21, 1871 (Sec. 93, Rev. Stat. District of Columbia), declaring that all laws not locally inapplicable shall have the same force and effect in the District of Columbia as elsewhere, and held that it did not extend the operation of Section 731 to the District of Columbia. He said, at page 565: "The provision, there-
"fore, for the punishment of offenses begun in one judicial
"circuit and completed in another can have no appli-
"cation to offenses begun in the District of Columbia
"and completed within a state. * * * Nor is any
"help to the opposite view to be derived from Section 93
"of the Revised Statutes of the District of Columbia,
"which enacts that the Constitution and all the laws of

"the United States not locally inapplicable shall have "the same force and effect within the District of Colum- "bia as elsewhere within the United States. An act di- "rected at offenses committed within a judicial circuit or "district has precisely the same effect as if it had de- "scribed the states or portions of states composing the "same. If it speaks of an offense, *e. g.*, begun in the "first circuit and completed in the second, it is as if it "described the very states embraced in each. Such a "law would, of course, be locally inapplicable to the Dis- "trict of Columbia; as much so as a law to punish smug- "gling in California. The only legislation which could "effect the application of Section 731 would be that which "would create in the District of Columbia a judicial cir- "cuit or district."

The reasoning of the judges in the foregoing cases is sound and conclusive. It cannot be disputed that Section 33 of the Judiciary Act referred only to Federal judicial districts, and that its successor, Section 1,014, R. S., is no broader in its scope. The Act of 1874 does not authorize a removal to the District of Columbia. The construction placed upon it by the Judiciary Committee is as conclusive as if this explanation of its intent had been incorporated in the Act. The Act can be given effect as empowering judges of the Courts of the District of Columbia to act as committing magistrates and to remove prisoners from the District without extending its scope to removals into the District. It does not by its terms make the removal statute applicable to offenses committed in the District, but only to the courts of the District. The enactment of the Act of 1874 referring specifically to the thirty-third section of the Judicary Act is also conclusive proof that the Act of February 21, 1871, was not deemed to extend the operation of the removal statute to the District of Columbia in any respect, and the removal statute is in any event locally inapplicable to the District of Columbia and not within the terms of the Act of 1871.

(b) The Supreme Court of the District of Columbia is not a court of the United States within the meaning of Section 1014, R. S. (or its predecessor, Section 33 of the Judiciary Act).

The "courts of the United States" named in the removal statute are the courts of the Federal judicial system, the constitutional courts created by Congress in the exercise of the authority given in Article III of the Constitution, Section 1, providing that "the judicial power "of the United States shall be vested in one Supreme "Court and in such inferior courts as the Congress may "from time to time ordain and establish." A court had already been created in the Northwest Territory by the Ordinance of 1787 (1 Stats. at Large, p. 51), but this court was clearly not within the terms of Section 33 of the Judiciary Act.

It has been held by this Court that the territorial courts created by Congress under its authority to make all needful rules and regulations respecting the territories or other property of the United States, Article IV. Section 3, Clause 2, are not courts of the United States. These are designated as legislative courts.

In *McAllister* v. *United States*, 141 U. S., 174, it was held that the District Court of Alaska was not one of the "courts of the United States." President Cleveland had suspended the plaintiff from his office as judge of that Court under Section 1768, R. S., which then provided that the President might suspend any civil officer except "judges of the courts of the United States." The plaintiff sued to recover salary for his unexpired term. Alaska was by statute constituted a civil and judicial district. Upon the District Court for the District of Alaska there had been conferred the jurisdiction of the District and Circuit Courts of the United States. Certain appellate jurisdiction was given to the United States Circuit Court in Oregon. It was held, however, that the words "courts

of the United States" in the statute there under consideration were used with reference to the constitutional courts of the United States, those courts in which the judicial power of the United States is vested under Article III, Section 1. The Court in the *McAllister* case quoted from the numerous earlier decisions upon this question and emphasized the distinctions between constitutional and legislative courts drawn in the earlier cases, namely, that the jurisdiction of the territorial courts is not part of the judicial power conferred by the Constitution, but is a jurisdiction created under the plenary legislative power which Congress possesses for the territories, and that the tenure of judges of these courts need not be during good behavior.

The *McAllister* case was followed in *Wingard* v. *United States*, 141 U. S., 201, where the question was whether a judge of the Supreme Court of Washington Territory was a judge of a court of the United States.

In *Steamer Coquitlam* v. *United States*, 163 U. S., 346, the question presented was whether an appeal lay from the District Court of Alaska to the Circuit Court of Appeals. It was held that the provision of Chapter 517 of the laws of 1891 as to appeals from "existing Circuit and District Courts" applied only to the constitutional courts, so-called; that the Alaska District Court was not one of the constitutional courts, and that the Circuit Court of Appeals of the United States had not jurisdiction of appeals therefrom under Section 6 of the Act of 1891, but only under Section 15, giving it jurisdiction of appeals from the Supreme Court of the territory.

In *Thiede* v. *Utah*, 159 U. S., 510, it was held that Section 1033 R. S., requiring that a copy of the indictment be delivered to defendant in certain criminal cases, did not apply to territorial courts.

See also *United States* v. *McMillan*, 165 U. S., 510; *Corbus* v. *Leonhardt*, 114 Fed., 12; *Jackson* v. *United States*, 102 Fed., 473, 479.

If, as is now well established, territorial courts created under the power of Congress to legislate for the territories of the United States are not courts of the United

States, it is impossible to conceive that the courts created for the District of Columbia by Congress under its power to legislate for the seat of government, Article I, Section 8, Clause 17, are courts of the United States. The courts created for the District of Columbia are created under a legislative power in effect identical with that under which territorial courts are constituted. They are not constitutional courts. Their jurisdiction is no part of the judicial power of the United States conferred in Article III, Section 1. The fact that the judges of the District of Columbia are appointed to hold office during good behavior does not alter the situation; *McAllister v. United States*, 141 U. S., at pp. 185, 186. The granting of that tenure was not compulsory upon Congress, and this fact is conclusive, that the courts of the District of Columbia are not constitutional courts.

The extent of the judicial power of the United States is prescribed in the Constitution, Article III, Section 2. The Supreme Court of the District of Columbia possesses jurisdiction which is not within the prescribed judicial power of the United States; for example, probate jurisdiction.

This question has been recently decided by the Court of Appeals of the District of Columbia in *Moss* v. *United States*, 23 App. Cas., 475. That was an appeal from a sentence of contempt imposed by the Supreme Court of the District of Columbia. It was claimed by the appellant that the sentence was imposed under Section 725, R. S., and was imposed erroneously under that section. It was contended *by the Government* that the Supreme Court of the District of Columbia is not a Court of the United States within the meaning of Section 725 R. S. It was held by the Court of Appeals that the Supreme Court of the District of Columbia is a Court of the United States upon the reasoning that that Court, equally with the Federal Circuit and District Courts, is created under constitutional authority. No reference whatever is made

to the distinctions repeatedly drawn by this Court between constitutional courts and legislative courts. The Court in that case asserted that it had been declared by this Court that the Supreme Court of the District of Columbia is a Court of the United States, and cites *Embry* v. *Palmer*, 107 U. S., 3; *Phillips* v. *Negley*, 117 U. S., 665; *Thompson* v. *Selden*, 20 How., 194; and *Garland* v. *Davis*, 4 How., 131. We do not read the cases cited as authority sustaining the conclusion of the Court of Appeals.

Embry v. *Palmer*, *supra*, involved a question whether a judgment obtained in the Supreme Court of the District of Columbia was entitled to full faith and credit in the courts of the State of Connecticut. Mr. Justice Matthews referred, on pages 9 and 10 of his opinion, to the Supreme Court of the District of Columbia as a court of the United States. The distinction between constitutional and legislative courts was not, however, involved in that case. The only question was the question whether a judgment of that Court was within Section 905, R. S., which provided that the records and judicial proceedings not only of the courts of any State, but also of any territory or of any country subject to the jurisdiction of the United States shall have such faith and credit in every court within the United States as they have by law or usage in the Courts of the State from which they are taken. It was, of course, held that the Supreme Court of the District of Columbia was the court of a country subject to the jurisdiction of the United States.

Phillips v. *Negley*, *supra*, involved the question whether the Supreme Court of the District of Columbia had the power to set aside a judgment rendered at a previous term of that Court, and it was held that this power did not exist in any of the courts of the United States and that that power was not conferred by the statute of the State of Maryland. No construction of the term courts of the United States was involved, and the

distinction between constitutional and legislative courts was not presented.

Thomson v. *Selden*, *supra*, involved the question of the production of books and papers in the course of a trial in the Circuit Court for the District of Columbia. Section 15 of the Judiciary Act authorized the court upon motion and due notice to require a party to produce books or writings in his possession and to order a non-suit upon failure of the party to comply therewith. The only point decided in this case was that the record did not show that any motion had been made to compel the plaintiff to produce the books and papers and that, therefore, the court was not authorized to enter a judgment of nonsuit. No reference to the Circuit Court of the District of Columbia as a court of the United States is made.

Garland v. *Davis*, *supra*, involved questions of pleading in the Circuit Court of the District of Columbia. The Court referred to the thirty-second section of the Judiciary Act, which empowers any court of the United States to permit either of the parties to amend any defect in the process or pleadings, but this Court did not apparently base its decision upon the said thirty-second section, but, on the authority of English cases, and in accordance with the practice of this tribunal in common law cases, declined to allow an amendment or repleader, but reversed the judgment and remanded the case for further proceedings in the court below. No question was presented in that case as to whether the Circuit Court of the District of Columbia was a court of the United States.

The Court of Appeals of the District of Columbia in the *Moss* case also referred to *Page* v. *Burnstine*, 102 U. S., 664, as a decision by this court that the Supreme Court of the District of Columbia is a court of the United States. On the contrary, this court, in *Page* v. *Burnstine*, expressly refused to decide this point, as is shown by the opinion in the case, and as was subsequently declared in the *McAllister* case. *supra*.

Section 61 of the Code of the District of Columbia, enacted March 3, 1901, provides, in reference to the Supreme Court of the District of Columbia, that, "The said Court "shall possess the same powers and exercise the same "jurisdiction as the Circuit and District courts of the "United States, and shall be deemed a Court of the "United States, and shall also have and exercise all the "jurisdiction possessed and exercised by the Supreme Court "of the District of Columbia at the date of the passage of "this Code."

This declaration that the Supreme Court of the District of Columbia shall be deemed a Court of the United States cannot make that Court one of the courts belonging to the judicial system of the United States created under the authority of the Constitution, which courts alone are within the scope of Section 1014, R. S. The Government's contention in the *Moss* case, *supra*, was that it is not within the power of Congress to make courts of the United States out of courts created by it under the authority given by clauses of the Constitution other than the third article, and that therefore the declaration of Congress that the Supreme Court of the District of Columbia shall be deemed a court of the United States is without significance.

In reference to Section 61 of the District Code, the Court of Appeals in the *Moss* case said that that section was only a declaration of pre-existing judicial decisions.

That the question under consideration has not been definitely and finally decided by this Court is indicated in the opinion in *Cross* v. *U. S.*, 145 U. S., 577, in which case this Court declined to decide the point.

We submit that the decision of the Court of Appeals in *Moss* v. *United States*, *supra*, is unsound, and that the Supreme Court of the District of Columbia, by analogy to the territorial courts and on sound reasoning, is not a court of the United States within the meaning of Section 1014, R. S.

Judge LACOMBE in this case below rested his decision in overruling the present contention upon the argument that "It is to be expected "that, even if the language of the original "section were not sufficient to include the District of "Columbia, Congress has provided in some way against "the extraordinary result of its legislation whereby an "individual who might commit murder upon the steps of "the Capitol could live in undisturbed security provided "he succeeded in getting beyond the limits of the District "of Columbia before he was arrested." Such an argument, we submit, is unsound and does not furnish even a plausible reason for a construction of a statute contrary to its plain meaning and contrary to the intention of Congress. If Congress has enacted no law providing for the apprehension of persons who commit a crime within the District of Columbia and escape thence, the omission should be supplied by Congress and not by the courts. Legislation can be enacted for that purpose which would leave no room for doubt as to its intention.

By the Act of February 9, 1903, Chapter 529 (Compiled Statutes, Supplement, page 99), the provisions of Section 1014 were made applicable to the removal of prisoners from any part of the United States to the Phillipine Islands, and to the removal of offenders from the Phillipine Islands to the United States. The explicit terms used by Congress in this act to effect this purpose are in marked contrast to the obscure and general language of the Act of February 21, 1871, which is claimed to have made this removal statute applicable to the District of Columbia.

POINT SIXTH.

The appellant is in any event entitled under the provisions of the Constitution to a trial in the State of California.

Each count in the indictment alleges that payments were made at Washington, in the District of Columbia. The evidence shows that the payments upon which the first six counts are based are three payments in or about March, 1903. The first three counts declare upon payments to Harlan, as chief of the Special Service Division of the Land Office, made respectively on March 15, March 20 and March 25. The fourth, fifth and sixth counts declare upon payments made on the same dates to Harlan, as a clerk in the Land Office. The testimony of Harlan shows that the three payments upon which these six counts are based were received by him in the District of Columbia by mail from San Francisco, California (Record, p. 99). There is no pretense on the part of the Government that the first six counts are based upon any other remittances than those to which Harlan testified, as above stated. The Government is foreclosed by this testimony of its own witness. It cannot, in the nature of the case, be claimed that there might have been other evidence than the testimony of Harlan before the Grand Jury to support this indictment. Harlan's testimony shows that these three remittances were the only remittances which he received upon which the first six counts can be based.

The question is, therefore, presented whether the appellant can be tried in the District of Columbia for a crime predicated upon the mailing of money in San Francisco to a person in the District of Columbia. The formal laying of a venue in the City of Washington cannot control the evidence of the Government's own witnesses.

The Constitution, Article III, Section 2, provides: "The

"trial of all crimes except in cases of impeachment shall "be by jury; and such trials shall be held in the State "where the said crime shall have been committed, but "when not committed within any State the trial shall be "at such place or places as the Congress may by law have "directed."

Amendment 6 to the Constitution provides that "In "all criminal prosecutions the accused shall enjoy the "right to a speedy and public trial by an impartial jury "of the State and District wherein the crime shall have "been committed."

If any crime was committed by the appellant in the present case, it was a complete crime in the State of California, and appellant is entitled, under the constitutional provisions above quoted, to a trial in that jurisdiction, and that jurisdiction alone.

In *United States* v. *Worrall*, 2 Dallas, 384, 388, the defendant was indicted for attempted bribery. The bribe was offered by a letter mailed in Philadelphia and received in New Jersey. The Circuit Court in the Pennsylvania district held that the crime was consummated in Philadelphia by the writing and mailing of the letter there, and that it consequently had jurisdiction.

In *United States* v. *Plympton*, 4 Cranch. (Circuit Court) 309, it was held that the mailing of a letter in Baltimore containing a forged check addressed to a person in Washington was an uttering of the forged paper in Baltimore and not in the District of Columbia, citing *United States* v. *Wright*, 2 Cranch. (Circuit Court) 296.

In *United States* v. *Bickford*, 4 Blatchf., 337, 339, it was held that the transmission of a fraudulent application for a pension by mail from Vermont to Washington was a crime committed in the District of Vermont, where the application was mailed.

In *United States* v. *Fowkes*, 53 Fed. Rep., 13, the defendant was arrested in Pennsylvania for removal to Missouri on an indictment charging him with giving discrimi-

nating rates to a shipper in violation of the interstate commerce act. It appeared that the only act done by the defendant was the signing of a line voucher in Pennsylvania. It was held that the crime was completed in Pennsylvania and not triable in Missouri, although the line voucher so signed by the defendant effected its purpose in Missouri.

In *Landa* v. *State* 26 Texas, App., 580, it was held that where a letter sent to one threatening to accuse him of a crime is mailed in B County, the offense is committed there and not triable in C County under a Code provision that offenses shall be prosecuted in the county where committed.

In *Commonwealth* v. *Dorrance*, 14 Phila., 671, the defendant, who lived in Pennsylvania near the New York line, delivered a sealed letter the contents of which were libelous to a messenger in Pennsylvania to be delivered in New York. It was held that the defendant could be indicted therefor in Pennsylvania.

These cases establish the proposition that if the acts of the defendant constituted the crime of bribery, the crime was complete and indictable in the State of California. It follows from that proposition that the appellant has a Constitutional right to a trial in the State of California. The crime consists of the act and the criminal intent. The criminal intent cannot be separated from the physical presence of the defendant. The intent, if any, had its existence only in the State of California. The only actual physical acts of the defendant were done in California. Even if the crime could be considered as having been constructively committed in the District of Columbia, where the letters were received, that locality not being a State, or a federal judicial district, this constructive act cannot deprive the defendant of his constitutional right to a trial in the State where the crime, if any, was committed.

In *In re Palliser*, 136 U. S., 257, the defendant was arrested in the Southern District of New York for alleged bribery of a postmaster in the District of Connecticut. The indictment alleged the offering of the bribe in Connecticut, but the evidence showed that the offer was by a letter mailed in New York. The petitioner claimed the constitutional right to a trial in New York. This Court held that if any offense was committed in New York by mailing the letter, it continued to be committed when the letter reached the postmaster in Connecticut, and that if no offense was committed in New York, the offense was committed in Connecticut; in either of which cases the Court in the District of Connecticut would have jurisdiction, and that it was unnecessary to decide whether the offense was complete in New York. This case is not, therefore, authority against the contention that the alleged crime in the present case was complete and indictable in California upon the mailing of the money. The Court plainly rested its decision in the *Palliser* case upon Section 731, U. S. R. S., which provides that when an offense is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either and may be tried in either district. The Court apparently held that the crime was continuous until the receipt of the letter in Connecticut, and that therefore, under Section 731, the offense was indictable and triable in the State of Connecticut. This Court certainly did not hold that the act of mailing the letter in New York was not a crime, nor did it hold that a crime was triable in Connecticut upon any other theory than that it was a continuous crime begun in one jurisdiction and completed in another.

But while Section 731 U. S., R. S., may have been applicable in the *Palliser* case, where the letter was both mailed and received in a judicial district of the United States, that section has no application to the present case since the letter here was mailed in the State and District

of California and received in the District of Columbia, which is not a judicial district within the meaning of that section.

It was held by Judge Cox in *United States v. Guiteau*, 1 Mackey, 564, that Section 731 has no application to a crime begun in the District of Columbia and completed in a state, and quotations from his opinion upon this point are made in the preceding point of this brief.

This removal to the Supreme Court of the District of Columbia for trial cannot therefore be sustained upon the theory that the offense here charged was a continuous crime begun in California and completed in the District of Columbia, for, to such a case Section 731 has no application. If the record shows a crime complete and indictable in California, the constitutional right to a trial in that State and District is absolute, and no trial therefor can be held in the District of Columbia upon the theory of a continuing crime or upon the theory that the crime was constructively committed in that jurisdiction, as well as in the State of California.

The recent decision of this Court in *Burton* v. *United States*, decided January 16, 1905, has no application to the point under consideration. The appellant in that case was charged with the crime of receiving a consideration for services rendered in violation of the statute. The gist of the offense was the receipt of the money, and it was held that the money was received in the District of Columbia, where the appellant received credit for the checks which had been sent him from Missouri. In the present case, the gist of the offense is the offering of money by the appellant with criminal intent.

The Government cannot deny this constitutional privilege of a trial in the State of California, except by insisting that the constitutional provision be construed as limiting the right to trial in a state to crimes which are committed wholly in the state and not embracing crimes which are constructively committed in some other jurisdiction

also; but if such construction be advanced, the same rule of construction would be equally applicable to the statute which is the sole authority for the jurisdiction of the Supreme Court in the District of Columbia and would defeat the jurisdiction of that Court. Section 83 of the Code of the District of Columbia of 1902, under which this indictment is found in the Supreme Court of the district, provides as follows: "The trial of crimes and mis-"demeanors committed in the District of Columbia shall "be in the Supreme Court of the District of Columbia "holding a special term as a criminal court."

If the constitutional clause in question is construed as limited to crimes wholly committed in the State, this Code section must, by the same rule of construction, be held to limit the jurisdiction of the Supreme Court of the District of Columbia to crimes wholly committed in the District of Columbia and not committed elsewhere, actually, constructively or partially. And if the jurisdiction of that Court is so limited, it has no jurisdiction of the charges contained in the first six counts of the indictment, and the defendant cannot be removed to the District of Columbia for trial.

The point here presented is not an unimportant or frivolous contention. A trial in the District of Columbia or in a territory of the United States does not afford the protection to a defendant which is afforded by a trial in the Federal Courts within the States. It is a serious matter to require a defendant to stand trial at a place several thousand miles from his home, among strangers, in a locality dominated by the Government, and whither he can bring witnesses only at enormous expense.

This contention was dismissed by the Court below without consideration, with the statement that it is unnecessary to discuss this question here since, concededly, the offenses charged in the seventh and eighth counts were committed in Washington. While it is true that

the present contention refers only to the charges contained in the first six counts of the indictment, if this contention be sustained, there can be no removal of the appellant to the District of Columbia. The uncontradicted and indisputable evidence of the Government's own witnesses proves conclusively that there is no probable cause to believe the appellant guilty of the offenses charged in the seventh and eighth counts of the indictment.

The seventh count charges a payment to Harlan on December 18, 1903. Harlan testified that when he saw the appellant at this time he spoke to him with reference to obtaining the notes of the investigation from the stenographer (Record, p. 102); that on December 18, the witness stated to appellant at the instance of special agent Burns the names of certain people purporting to be the names of persons who had testified during the investigation (Record, pp. 103, 104); that thereafter appellant gave witness $200; that appellant refused to pay $1,000 or $500 for the stenographer's notes and had said that he didn't see why he should pay out money for others (Record, p. 133); that witness had not the stenographer's notes in his possession, had no intention of furnishing the stenographer's notes to the appellant, and presumed that he could not have obtained the stenographer's notes unless he had stolen them, and that he was not in a position to obtain them at all in the ordinary course of his duty (Record, p. 132). Harlan testified also that when he spoke to appelant in relation to the stenographer's report appellant replied that he did not want it (Record, p. 132).

This testimony shows conclusively that the alleged December payment was not made by appellant to the witness for the purpose of obtaining the report of the special agent. It shows that the transaction at this time upon which the seventh count is based related in no

respect to a publication by Harlan of the contents of the special agent's report which he should have obtained in the course of his duties or by reason of his employment as a clerk in the Land Office, but related entirely to the stenographer's notes of the investigation, which is a very different thing, and that the transaction consisted entirely of an offer by Harlan to procure the notes of the investigation and that that offer was refused by the appellant. And in addition, it is worthy of note that Harlan's entire transactions with the appellant in December were instigated by the Government officials, and his dealings with the appellant were throughout for the purpose of entrapping the appellant into the commission of some criminal offense (Record, pp. 122, 126, 127, 129–132, 134, 151–153).

The eighth count charges a payment to Valk on December 16, 1903. Valk testified that on December 16 he saw the appellant at a hotel in Washington, and talked with him about the investigation; that he told appellant that appellant's name had been mentioned in the course of the investigation, and that the witness had been asked about him (Record, pp. 170, 187); that after this conversation he received $100 from appellant (Record, p. 171). There is no pretence of any testimony that the appellant requested Valk to obtain any information for him concerning the investigations or that Valk offered to perform such a service. The payment of money to Valk at this time is explained by the previous relations existing between appellant and the witness. Valk testified at length to services rendered for the appellant during previous years in expediting the appellant's applications pending in the Land Office. These transactions were perfectly innocent transactions, entirely unconnected with the charges made in the present case, and the evidence thereof was introduced by the United States attorney for the purpose of showing the prior

relations existing between the appellant and the witnesses and it has never been suggested by the Government that it is useful for any other purpose. It appears that Valk had on one or two occasions prior to this time written the appellant requesting money as a loan to make good losses in stock speculations (Record, pp. 183, 185, 188). Valk testified also that at this time appellant still owed him for services rendered prior to September, 1902, over $400, according to his calculations (Record, pp. 184, 185).

The whole transaction between the appellant and Valk in December, is thus shown by the testimony of Valk himself to have consisted in the appellant's inquiry as to what witness knew concerning the investigation and the reply of the witness that the appellant's name had been mentioned in that connection. This certainly furnishes no foundation for a finding of probable cause to believe that the appeliant paid money to Valk on December 16 with intent to induce him to reveal the contents of the report of the special agents.

The testimony of the Government's own witnesses, therefore, destroys the *prima facie* case of probable cause as to the charges made in the seventh and eighth counts of the indictment, which the indictment itself would have furnished if unsupported by evidence. Upon the whole record, considering the indictment and the evidence together, the Government has not only failed to show probable cause in relation to counts seven and eight, but the government has made it affirmatively appear that the payments alleged in these counts were not made for the purposes declared in the indictment.

If, therefore, the contention that the appellant is entitled under the Constitution to a trial in the State of California on the first six counts of the indictment is sustained, there can be no removal to the District of Columbia, since the Government has disproved the allegations in the remaining counts of the indictment.

The order of the Circuit Court dismissing the writ of habeas corpus should be reversed and that Court directed to discharge appellant.

FRANK H. PLATT,
of Counsel.

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